No. ____

COURT OF APPEALS FOR THE SIXTH APPELLATE DISTRICT OF TEXAS

IN RE WALMART INC.,

Relator

From the 71st Judicial District Court
Harrison County, Texas
Cause No. 18-1378
Honorable Brad Morin, presiding

PETITION FOR WRIT OF MANDAMUS

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MARCH 11, 2022

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STATEMENT OF THE CASE

Nature of the case:	Fintiv, Inc. sued Walmart Inc. for misappropriation of trade secrets. (MR 2-12, 1179-1191) After this Court affirmed the denial of Walmart's special appearance and remanded (*Walmart Inc. v. Fintiv, Inc.*, No. 06-20-00071-CV, 2021 WL 3572728 (Aug. 13, 2021), Walmart moved for an express ruling on its request to dismiss because a mandatory forum-selection clause precludes Fintiv from bringing this suit in Texas. (MR 1234-73) The trial court denied Walmart's motion. (MR 1282) This is a petition for a writ of mandamus from that order.
Trial court:	71st District Court, Harrison County, Texas Honorable Brad Morin, presiding
Trial court disposition:	The trial court denied Walmart's motion to dismiss on February 1, 2022.

STATEMENT REGARDING ORAL ARGUMENT

Walmart respectfully requests oral argument. Having counsel available to answer questions about the record and the issues would likely aid the Court's decisional process.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of mandamus to enforce the parties' contractual forum-selection clause. *In re AutoNation, Inc.*, 228 S.W.3d 663, 667-68 (Tex. 2007). "Mandamus relief is available to enforce forum-selection clauses" because "failure to enforce a contractual forum-selection clause 'constitutes a clear abuse of discretion for which there is no adequate remedy by appeal.'" *Id.* (citation omitted); *see* TEX. GOV'T CODE § 22.221(b) (court of appeals' writ power).

ISSUE PRESENTED

Should mandamus be granted because the district court abused its discretion by refusing to dismiss this suit from Texas court based on the parties' contractual agreement to litigate only before Arkansas courts?

PRELIMINARY STATEMENT

Fintiv agreed to litigate this dispute only in Arkansas. When Fintiv and Walmart began the discussions that led to this lawsuit, they struck an agreement. That agreement set forth the confidentiality obligations governing the information the parties exchanged. The parties committed to resolve any disputes arising from the agreement exclusively before Arkansas courts.

As the agreement contemplated, the parties exchanged information. Fintiv now alleges that Walmart misused some of its confidential information. So, as the agreement provided, this dispute must be resolved in Arkansas.

Despite that promise, Fintiv filed this suit in Texas court. Fintiv's petition even acknowledged that the suit arises from alleged misappropriation of information shared under the parties' confidentiality agreement—the very agreement requiring the parties to resolve their disputes in Arkansas.

Walmart objected to suit in Texas, and in response, Fintiv amended its petition. Fintiv scrubbed most (but not all) of its references to the confidentiality agreement. And while the original petition alleged that Fintiv shared the trade secrets at issue only during meetings in Arkansas, Fintiv's amended petition added allegations about meetings in Texas. That included a meeting between Fintiv and an independent company called MCX—a consortium of some of the nation's largest

retailers—whose actions Fintiv tries to attribute to Walmart by asserting MCX acted as Walmart's agent.

This Court should reject Fintiv's attempt to evade the parties' binding forum-selection agreement. Fintiv agreed that "exclusive jurisdiction" over "any dispute arising from" the confidentiality agreement would lie in Arkansas. (MR 271) This dispute arises from that agreement several times over. This is a suit about what confidentiality obligations Walmart owed, the very subject of the agreement. And the agreement is essential to Fintiv's legal theory and to the factual allegations that supposedly support it. Fintiv tried to erase the agreement from its pleading, but the Texas Supreme Court has forbidden plaintiffs from artfully pleading around forum-selection clauses.

When this case was previously before this Court, it did not reach these forum-selection issues because the trial court had not clearly ruled on them. On remand, the trial court entered an order expressly declining to enforce the forum-selection clause. That refusal to enforce the parties' agreed-to forum warrants mandamus, and this case should be dismissed from Texas court.

STATEMENT OF FACTS

I. Factual background.

A. Walmart, headquartered in Arkansas, developed a mobile application called Walmart Pay in 2015.

Walmart Inc. is a Delaware corporation headquartered in Bentonville, Arkansas. (MR 365) This suit concerns Walmart Pay, a feature in a mobile application that allows customers to use a mobile device to pay for goods at a Walmart store. (MR 45) To use Walmart Pay, customers first link their Walmart account to an existing form of payment, like a credit card or gift card. (MR 45) Walmart Pay then allows customers to pay with that tender type at the register by scanning a code with their mobile device. (MR 45)

Walmart began development of Walmart Pay in early 2015, with teams working in Arkansas, California, Oregon, and Sweden. (MR 44-45, 288-289 (Tr. 53:17-56:6)) No development of Walmart Pay occurred in Texas, where at the time Walmart did not even have the ability to do that work. (MR 45)

B. Previously, in 2008, Fintiv submitted a proposal to build a different mobile application for Walmart.

Years before Walmart developed Walmart Pay, it had explored the possibility of using a third-party contractor to build a mobile application. (MR 41) The application Walmart envisioned at that time, while generally concerned with mobile commerce, was "completely different" from what Walmart later developed as

Walmart Pay. (MR 289 (Tr. 54:10-21), 298 (Tr. 91:6-19)) Walmart Pay is a "check-in, checkout system" that does not store funds or process payments on the mobile device. (MR 45-46, 298 (Tr. 91:6-19)) In contrast, the application proposed in 2008 sought to allow customers to manage stored funds on a mobile device, for example by viewing balances or paying bills. (MR 298 (Tr. 91:9-19, 93:5-21))

One company that tried to win a contract to build this different potential mobile application was Fintiv, Inc. (known at various points in its history as Mozido, Affinity Global Services, and Mobile Media Group). (MR 41, 1179 n.1) Fintiv is a Delaware corporation with its principal office in Austin, Texas. (MR 1180)

C. Fintiv and Walmart entered into a non-disclosure agreement.

Fintiv alleges that it began working on a proposed mobile-wallet application for Walmart in 2008. (MR 1186) Fintiv employees testified that a prerequisite for substantive discussions with Walmart was a non-disclosure agreement: company "policy" and "practice" required a non-disclosure agreement before discussing company technology. (MR 859 (Tr. 95:19-25), 870 (Tr. 152:1-7), 876-77 (Tr. 53:13-54:5)) Accordingly, at the start of the parties' mobile-wallet discussions, Fintiv and Walmart entered into a "Mutual Confidentiality and Non-Disclosure Agreement" in September 2008 ("Non-Disclosure Agreement" or "NDA").

The Non-Disclosure Agreement sets forth the terms for the exchange of information between Fintiv and Walmart. As the parties explained in the contract,

they "agree[d] to exchange, manage and maintain . . . Confidential Information for purposes of performing the Services subject to the terms and conditions of this Agreement." (MR 268) "Services," the agreement explains, refers to "a potential business arrangement between the Parties." (MR 268) And "Confidential Information" covered by the agreement "mean[s] information, whether written or oral, received by the Recipient or its Representatives . . . that relates to the Disclosing Party and is not generally available to the public, or which would reasonably be considered confidential and/or proprietary or which is marked 'Confidential' or 'Proprietary' by the Disclosing Party." (MR 268) "Representatives" includes the "agents of each Party." (MR 268-69)

The Non-Disclosure Agreement details the confidentiality obligations attending the parties' information exchange. That instrument, the parties agreed, "represents the entire agreement between the Parties concerning the subject matter of this Agreement." (MR 271)

The section of the Non-Disclosure Agreement titled "Non-Disclosure Obligations" provides:

2. **Non-Disclosure Obligations.**

a) The Recipient, for a period beginning with the Effective Date, and continuing for three (3) years from the cessation of unsuccessful negotiations or the consummation of the Services (by execution of the relevant document(s)), whichever occurs first, shall maintain and protect the confidentiality of the Confidential Information with the same degree of care as is normally used in the protection of its own confidential and proprietary information but in no event with less than a reasonable standard of care. The Recipient further agrees not to use Confidential Information for any purpose, except for purposes related to the Services.

(b) The Recipient shall maintain and protect the confidentiality of the Disclosing Party's Confidential Information with the same degree of care as is normally used in the protection of its own confidential and proprietary information. Each Party further agrees not to use Confidential Information for any purpose, except as set forth herein or except as otherwise directed in writing by the Disclosing Party of such Confidential Information.

(c) Without the prior consent of the Disclosing Party, the Recipient will not direct or allow its Representatives to disclose to any unauthorized third party, including but not limited to the press: (i) discussions concerning the Services involving the Parties, (ii) the fact that either Party has requested or received Confidential Information from the Disclosing Party; or (iii) any of the terms, conditions or other facts with respect to the Services, including any of the terms of this Agreement or its existence.

(d) The Recipient shall limit access to the Confidential Information to those Representatives (i) who need to know such information solely for the purpose of developing or performing the Services; (ii) who have been informed of the confidential nature of such information; and (iii) who agree to act in accordance with the terms of this Agreement. Each Party shall cause their respective Representatives to observe the terms of this Agreement and shall be responsible for any breach of this Agreement by any of its Representatives. Each Party shall take all reasonable measures, including without limitations court proceedings, to restrain its Representatives from unauthorized disclosure of the Confidential Information.

(e) The restrictions set forth in this Section 2 shall not apply with respect to Confidential Information which (i) is already available to the public; (ii) becomes available to the public through no fault of the Recipient or its Representatives; (iii) is already known to the Recipient on a non-confidential basis, as shown by written records in the Recipient's possession at the time that the Confidential Information was received; or (iv) disclosures required by law.

(MR 269) Thus, the party receiving Confidential Information is obliged under section (a) to follow certain standards in "maintain[ing] and protect[ing] the

confidentiality of" that information and to respect limits on the information's "use." (MR 269) At the same time, the Non-Disclosure Agreement sets boundaries on these obligations. For example, the confidentiality obligations expire, as subsection (a) provides, "three (3) years from the cessation of unsuccessful negotiations or the consummation of the Services." (MR 269)

D. In the Non-Disclosure Agreement, Fintiv and Walmart agreed to exclusive jurisdiction in Arkansas.

Elsewhere in the Non-Disclosure Agreement, the parties agreed to a broad forum-selection clause setting "exclusive jurisdiction" over "any dispute arising from this Agreement" in Arkansas:

> 8. **Choice Of Law.** The Parties mutually acknowledge and agree that this Agreement shall be construed and enforced in accordance with the laws of the state of Arkansas. The Parties agree and consent to the exclusive jurisdiction of the state and federal courts of Arkansas to resolve any dispute arising from this Agreement and waive any defense of inconvenient or improper forum.

(MR 271) That was not the first time Fintiv and Walmart had agreed to exclusive jurisdiction in Arkansas. A previous non-disclosure agreement between Walmart and Fintiv's predecessor, executed during discussions in 2001, likewise required suits to be brought in Arkansas. (MR 1525-26)

E. Fintiv and Walmart held discussions under the Non-Disclosure Agreement that were ultimately fruitless.

With the 2008 Non-Disclosure Agreement in place, the parties began discussing Fintiv's proposal to create a mobile application for Walmart.

Fintiv prepared a response to Walmart's request for proposal, captioning the document "Confidential under terms of Walmart / Mozido NDA" (Fintiv was called "Mozido" at the time). (MR 486) The parties also held several in-person meetings. These discussions, Fintiv employees understood, occurred "pursuant to" the Non-Disclosure Agreement. (MR 859 (Tr. 94:17-23), 870 (Tr. 152:1-4)) According to Fintiv's interrogatory responses, it had the following meetings with Walmart employees:

- July 23, 2009: **Bentonville, Arkansas**
- April 26, 2010: **Bentonville, Arkansas**
- May 17, 2010: **Bentonville, Arkansas**
- June 16, 2010: **Bentonville, Arkansas**
- February 10, 2011: **Bentonville, Arkansas**
- February 28, 2011: **Bentonville, Arkansas**
- January 5, 2012: **Bentonville, Arkansas**

(MR 898-99, 909) Fintiv elsewhere alleges that it also met with Walmart twice in Dallas, Texas, in August and September 2010. (MR 1187)

In December 2010, Walmart selected another company, Obopay, for the mobile-wallet project. (MR 42) After some further work with Obopay, Walmart decided to abandon the project, which "has never been implemented to this day." (MR 42)

F. Fintiv later proposed to build a mobile application for a third party, MCX.

Merchant Customer Exchange ("MCX") was an independent company formed in 2012 by "a coalition of approximately 40 merchants representing nearly 80 brands, including a number of top retailers and restaurant companies in the United States," such as Target, Wendy's, and 7-Eleven. (MR 1086, 1095, 1166, 1542, 1616-23) Walmart was one member of the coalition, holding the same minority interest and the same representation on MCX's board as several other investors. (MR 1558, 1616-20) When MCX was just getting started, Walmart also lent some of its employees to contribute to the company's work. (MR 42) The goal of this consortium was to build a "mobile commerce solution." (MR 1166)

Fintiv hoped MCX would hire it to help build this mobile solution. A Walmart employee "tried to facilitate that for [Fintiv] by making an introduction," a Fintiv employee testified. (MR 1034 (Tr. 116:9-16)) Following up on that introduction, Fintiv alleges it presented to MCX in Dallas in September 2012. (MR 909, 1187)

In February 2014, however, MCX chose another company, Paydiant, over Fintiv. (MR 1031 (Tr. 113:13)) MCX is now defunct. (MR 1122 (Tr. 56:14-21)) Walmart, when later developing Walmart Pay, used no information obtained through MCX. (MR 287 (Tr. 47:25-48:5))

II. Procedural background.

A. Fintiv sued Walmart in Harrison County, Texas.

In December 2018, Fintiv sued Walmart in the 71st District Court of Harrison County, Texas. (MR 2-12) Fintiv accused Walmart of acquiring Fintiv's trade secrets during the discussions over Fintiv's mobile-application proposal and using that information in developing Walmart Pay. (MR 9-10) That, Fintiv claimed, entitled it to damages and injunctive relief for misappropriation of trade secrets under the common law and the Texas Uniform Trade Secrets Act. (MR 11)

According to Fintiv's original petition, when "Fintiv disclosed its intellectual property and/or proprietary trade secrets to Walmart," it did so "under the Fintiv-Walmart NDAs." (MR 4) The petition explained that "[t]his action *arises from* Walmart's infringement and misappropriation of Fintiv's trade secrets and confidential information Fintiv shared with Walmart under a series of binding nondisclosure agreements in the years 2000, 2008, and 2011." (MR 3 (emphasis added)) The petition devoted a section to recounting how "Fintiv enter[ed] non-disclosure agreement(s) with Walmart." (MR 6-7 (capitalization altered)) Fintiv then described several meetings at which Fintiv allegedly disclosed trade secrets to Walmart, all held "[a]fter entering the Fintiv-Walmart NDAs." (MR 7-9) The petition identified several of those meetings as occurring in Bentonville, Arkansas, but none as occurring in Texas. (MR 7-9)

B. Walmart sought dismissal from Texas court.

Walmart filed a special appearance objecting to Fintiv's bringing this suit in Texas. (MR 77-99) Walmart explained that it is subject to neither general nor specific jurisdiction in Texas for this suit. In the same instrument as the special appearance, Walmart also sought dismissal because the Non-Disclosure Agreement made Arkansas the exclusive forum for the suit.

C. Fintiv re-pleaded its claims.

By July 2020, Fintiv's jurisdictional discovery from Walmart had been completed for nearly a year, the depositions of Fintiv's own witnesses had been completed for six months, and the parties had conducted two rounds of briefing and a hearing on Walmart's special appearance. (MR 77-99, 239-65, 276, 528-51, 818-37, 955-969, 976, 1056, 1077, 1082-1103, 1285-1331) With the special appearance finally ready for decision, Fintiv tried to change course. Just one week before the second hearing on the special appearance, on July 22, 2020, Fintiv filed an amended petition. (MR 1179-1191) This amended pleading, which is now the live pleading, omits most references Fintiv had made to non-disclosure agreements. (MR 1206-07, 1210-11) Gone, for example, is Fintiv's previous acknowledgment that "[t]his action arises from" misappropriation of trade secrets "Fintiv shared with Walmart *under a series of binding nondisclosure agreements* . . . ." (MR 3 (emphasis added))

The amended petition, however, still recounts that the parties entered into the 2008 Non-Disclosure Agreement. (MR 1181)

In addition, the amended petition added allegations about MCX—which the original petition never mentioned. Fintiv posits that MCX acted as Walmart's agent, conclusorily alleging that all of MCX's actions and contacts with Texas can be attributed to Walmart. (MR 1182) Fintiv now alleges that Walmart misappropriated Fintiv's trade secrets revealed not only in Fintiv's discussions with Walmart (over the project for which Walmart ultimately chose Obopay) but also in Fintiv's discussions with MCX (over the project for which MCX ultimately chose Paydiant). (MR 1185-89) The amended petition alleges that Fintiv met with MCX in Dallas. (MR 1187-88) Fintiv also added an allegation that Fintiv and Walmart met in Dallas in August and September 2010. (MR 1187)

While Fintiv first alleged that it "disclosed its intellectual property and/or proprietary trade secrets to Walmart *under the Fintiv/Walmart NDAs*," now it alleges that it "disclosed its intellectual property and/or proprietary trade secrets to *Walmart/MCX*." (MR 1208 (emphases added)) Besides culling references to the Non-Disclosure Agreement and adding references to MCX, however, the amended pleading otherwise is nearly identical to the original one. (MR 1204-19 (redline showing amendments)) The amended petition advances the same cause of action

and retains the original petition's factual allegations (besides those about non-disclosure agreements). (MR 1204-19)

D. The trial court denied Walmart's special appearance and this Court affirmed that ruling, without reaching the forum-selection clause issues.

On August 31, 2020, the trial court issued an order denying Walmart's special appearance. (MR 1227) Walmart filed an interlocutory appeal from the denial of the special appearance and, in the alternative, a petition for writ of mandamus from the refusal to enforce the forum-selection clause.

This Court affirmed the denial of Walmart's special appearance on the ground that Walmart had waived its personal jurisdiction arguments by not having them heard and determined before advancing its dismissal arguments based on the forum-selection clause. *See Walmart Inc. v. Fintiv, Inc.*, No. 06-20-00071-CV, 2021 WL 3572728, at *10-11. But the Court did not reach Walmart's arguments based on the forum-selection clause because it construed the trial court's order "as denying only Walmart's special appearance." *Id.* at *11. This Court thus remanded the case to the trial court for further proceedings, stating that it was "express[ing] no opinion as to the merits" of Walmart's arguments for dismissal based on the forum-selection clause and explaining that Walmart could seek appellate review "if, and when, it obtains an adverse order from the trial court on its motion to dismiss." *Id.* at *12 n.16.

E. On remand, the trial court denied Walmart's motion to dismiss based on the forum-selection clause.

On remand, Walmart moved for an express ruling on its request to dismiss the suit based on the forum-selection clause. (MR 1235-72, 1275) Fintiv argued that the trial court "ha[d] already decided" the forum-selection clause issues before the interlocutory appeal and Fintiv chose to "stand[] on its prior briefing" to the trial court. (MR 1279) The trial court held a hearing on January 12, 2022. (MR 1395-1436) On February 1, 2022, upon consideration of Walmart's "Motion, prior briefing, and any responses and exhibits attached thereto," the trial court issued a summary order denying dismissal. (MR 1282)

STANDARDS OF REVIEW

Contractual interpretation of a forum-selection clause is reviewed *de novo*. *Clark v. Power Mktg. Direct, Inc.*, 192 S.W.3d 796, 798 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Failure to properly interpret or enforce a forum-selection clause is an abuse of discretion warranting mandamus relief. *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (per curiam).

Although any factual findings necessary to support the trial court's ruling that are supported by the evidence are implied, such implied findings are not conclusive and can be challenged for legal or factual insufficiency. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). A legal sufficiency challenge succeeds "when (a) there is a complete absence of evidence of a vital fact; (b) the

court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact." *Reed v. Wright*, 155 S.W.3d 666, 671 (Tex. App.—Texarkana 2005, pet. denied). A factual sufficiency challenge succeeds if the evidence supporting the finding is "so weak or against the great weight and preponderance of the evidence that it should be set aside." *Endsley Elec., Inc. v. Altech, Inc.*, 378 S.W.3d 15, 21 (Tex. App.—Texarkana 2012, no pet.). The reviewing court "consider[s] all of the evidence in the case in making this determination, not just the evidence that supports the finding." *Id.* at 21-22.

SUMMARY OF THE ARGUMENT

A binding contract mandates that this case be brought in Arkansas and not in Texas. When Fintiv and Walmart entered the Non-Disclosure Agreement, they agreed that Arkansas courts would have "exclusive jurisdiction" over "any dispute arising from this Agreement." (MR 271) That forum-selection clause governs this case and requires dismissal.

This is a "dispute arising from" the Non-Disclosure Agreement for at least three reasons. *First*, the Non-Disclosure Agreement sets forth binding terms addressing the very subject matter of this dispute: the disclosure and use of confidential information shared between Fintiv and Walmart. *Second*, the

Non-Disclosure Agreement is legally essential to Fintiv's claims. Fintiv's claims require a court to consider whether Walmart had consent for its alleged use of Fintiv's information and whether Walmart breached a duty of confidentiality. The court cannot do so without interpreting the Non-Disclosure Agreement. *Third*, the Non-Disclosure Agreement is a factual predicate for the dispute. Had the parties not entered into the Non-Disclosure Agreement, the facts as alleged would not have occurred.

Fintiv tried to recharacterize its claims to avoid invoking the Non-Disclosure Agreement. But a plaintiff cannot avoid a forum-selection clause through "artful pleading." *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 440 (Tex. 2017). The Texas Supreme Court has foreclosed the very tactics Fintiv attempted: hypothesizing a world without the parties' agreement and then suing under tort and statutory law rather than for breach of contract.

Fintiv also contends that certain subsets of the trade-secret disclosures at issue are not governed by the Non-Disclosure Agreement's confidentiality obligations—specifically, (1) disclosures after the Agreement's confidentiality obligations supposedly expired and (2) disclosures to MCX. Those contentions are red herrings. Even if *some* allegations in this suit are not governed by the Agreement's confidentiality obligations, *other* allegations are (as Fintiv has never contested). And, as Fintiv also has never contested, a dispute arises from an agreement when the

agreement is one cause of the dispute, even if not the sole cause. This dispute thus arises from the Non-Disclosure Agreement even if the dispute also involves additional allegations. Moreover, Fintiv's contentions about expiration dates and MCX fail on their own terms for multiple reasons. The confidentiality obligations did not expire before any meetings between Fintiv and Walmart, and even if they did, the forum-selection clause has no expiration date. In addition, MCX is not Walmart's agent, and even if it were, the forum-selection clause would still apply.

Because the Non-Disclosure Agreement's forum-selection clause encompasses this dispute, exclusive jurisdiction lies in Arkansas. That clause must be enforced.

ARGUMENT

Fintiv is contractually bound to litigate this dispute in Arkansas. The trial court's failure to dismiss the suit was wrong, even accepting implied factual findings in Fintiv's favor. In addition, as shown below, several of Fintiv's key factual assertions are "against the great weight and preponderance of the evidence," providing more reasons to correct the decision below and issue a writ of mandamus. *Endsley Elec.*, 378 S.W.3d at 21.

I. The Non-Disclosure Agreement's forum-selection clause requires Fintiv to bring this dispute only in Arkansas.

In the Non-Disclosure Agreement, Fintiv and Walmart "agree[d] and consent[ed] to the exclusive jurisdiction of the state and federal courts of Arkansas to resolve any dispute arising from this Agreement." (MR 271) Such "[f]orum-selection clauses provide parties with an opportunity to contractually preselect the jurisdiction for dispute resolution." *Pinto*, 526 S.W.3d at 436. "Failing to give effect to contractual forum-selection clauses and forcing a party to litigate in a forum other than the contractually chosen one amounts to clear harassment injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics." *Id.* at 436-37 (citation, quotation marks, and alterations omitted). Here, Fintiv's dispute with

Walmart falls within the Non-Disclosure Agreement's forum-selection clause and therefore cannot be brought in Texas court.[1]

Whether "noncontractual claims fall within [a] forum-selection clause's scope depends on the parties' intent as expressed in their agreement and a 'common-sense examination' of the substantive factual allegations." *Pinto*, 526 S.W.3d at 437 (quoting *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677 (Tex. 2009)). In *Pinto*, the Texas Supreme Court addressed a contractual forum-selection clause that applied to "any dispute arising out of this Agreement." *Id.* That language is capacious. "[T]he words 'arising out of' have 'broad significance,'" and "[w]hen a forum-selection clause encompasses all 'disputes' 'arising out of' the agreement, instead of 'claims,' its scope is necessarily broader than claims based solely on rights originating exclusively from the contract." *Id.* at 437, 439 (citations and alterations omitted). A dispute arises out of an agreement, for example, if the agreement's "existence or terms . . . are operative facts in the dispute" and "'but for' that agreement the [plaintiffs] would not be aggrieved." *Id.* at 440.

[1] Although the Non-Disclosure Agreement's choice-of-law provision selects Arkansas law, the Texas Supreme Court has applied Texas law to determine whether a forum-selection clause applies and should be enforced, even in the presence of such a choice-of-law provision. *In re Lisa Laser*, 310 S.W.3d at 883 n.2 (citing decisions).

In *Pinto*, the Supreme Court held that the broad language of the forum-selection clause encompassed the parties' dispute. There, two shareholder plaintiffs accused majority shareholders and other defendants of reducing the value of the plaintiffs' holdings, in part by amending the company's shareholder agreement. *Id.* at 435. Although the plaintiffs' claims sounded in statute and common law rather than in contract, the Court held that the dispute arose out of the amended shareholder agreement. *Id.* at 440-42.

For one, the Supreme Court reasoned, the dispute's operative facts would not have occurred without the agreement. *Id.* at 440-41. For another, the agreement played a "central role" in the plaintiffs' claims. *Id.* at 441. As the Supreme Court observed, the claims "ultimately, and actually, depend[ed] on the existence of" the agreement, "resolution of the case involve[d] the validity of that agreement," and "the operative facts implicate[d] the [defendants'] authority to act pursuant to that agreement." *Id.*; *see also, e.g.*, *In re Bambu Franchising LLC*, No. 05-17-00690-CV, 2017 WL 4003428, at *3 (Tex. App.—Dallas Sept. 12, 2017, orig. proceeding) (non-contractual claims "ar[o]se from the business relationship that was struck through the agreements and will require review and interpretation of the agreements by the trial court or trier of fact for [the plaintiff] to prevail"); *SH Salon L.L.C. v. Midtown Mkt. Mo. City, TX, L.L.C.*, 632 S.W.3d 655, 657-59 (Tex. App.—Houston [14th Dist.] 2021) (non-contractual claims "ar[o]se out of the [parties'] contractual

relationship" because "[b]ut for the commercial lease between these two parties, the claim would not exist").

The same principles required dismissal from Texas court in a trade-secret case like this one, *In re Killick Aerospace Ltd.*, No. 02-20-00280-CV, 2020 WL 7639575 (Tex. App.—Ft. Worth Dec. 23, 2020, orig. proceeding). As here, the parties in *Killick* were bound by agreements governing how the defendant could "possess and use" the plaintiffs' "confidential information and trade secrets." *Id.* at *1. Those agreements included a forum-selection clause setting "'exclusive jurisdiction'" outside Texas. *Id.* at *2 (covering "'any action, suit or proceeding arising out of, or connected with, this Agreement'"). Like Fintiv, the plaintiffs brought trade-secret claims under the common law and the Texas Uniform Trade Secrets Act. *Id.* at *1. And like Fintiv, the plaintiffs filed an amended petition excising references to the contracts. *Id.* at *4.

The court rejected the plaintiffs' attempt to "characterize [their] claim as a tort claim to evade the agreed-upon forum." *Id.* Instead, the court applied *Pinto*'s analysis of forum-selection clauses covering disputes "arising out of" a contract. *Id.* at *3. Under *Pinto*, "the forum-selection clause should be denied force only if the facts alleged in support of the claim can stand alone, the alleged facts are completely independent of the contract, and the claim could be maintained without reference to the contract." *Id.* at *4 (citing *Pinto*, 526 S.W.3d at 440). The trade-secret claims

failed to clear those hurdles. *Id.* Under Texas trade-secret law, "the trier of fact would necessarily have to look at the distribution agreements to determine whether [the plaintiff] had consented to the possession and use of the allegedly misappropriated trade secrets and confidential and proprietary information." *Id.*

So too here. Fintiv and Walmart agreed to a forum-selection clause with language as broad as the operative language in *Pinto* and *Killick*: "any dispute arising from this Agreement." (MR 271); *see Pinto*, 526 S.W.3d at 437, 442 (using "any dispute arising from" and "any dispute arising out of" interchangeably (emphasis omitted)); *Killick*, 2020 WL 7639575, at *3-4 (applying *Pinto*'s analysis of the phrase "arising out of"). In at least three independent ways, Fintiv's dispute with Walmart arises from the Non-Disclosure Agreement.

A. The Non-Disclosure Agreement covers the subject matter of this dispute.

First, this dispute concerns the very subject of the agreement: the alleged disclosure and use of Fintiv's confidential information. Fintiv alleges that Walmart "misappropriate[ed]" "confidential information Fintiv shared with Walmart, over the course of a lengthy relationship between the parties." (MR 1181) That is what the Non-Disclosure Agreement governs: It establishes terms for how Fintiv and Walmart, "in connection with a proposed business relationship," "agree to exchange, manage and maintain . . . Confidential Information." (MR 268) The Non-Disclosure Agreement identifies the parties' obligations as to confidential

information and the limits on those obligations. (MR 269) These rights and obligations in the Non-Disclosure Agreement "represent[] the entire agreement between the Parties concerning the subject matter of this Agreement." (MR 271)

The Non-Disclosure Agreement thus sets forth the ground rules for this dispute. So, as in *Pinto*, "the operative facts implicate" the defendant's "authority to act pursuant to th[e] agreement." 526 S.W.3d at 441. Fintiv's "alleged grievances emanate from the existence and operation of that agreement"; but for the agreement, the parties would not have the same rights and obligations now at issue in this dispute. *Id.* And "a 'common-sense examination' of the substantive factual allegations," *id.* at 437 (citation omitted), shows that the agreement and the subject of the dispute overlap.

B. The Non-Disclosure Agreement is essential to Fintiv's legal claims.

Second, the Non-Disclosure Agreement is essential to the legal claims in this dispute. Fintiv alleges that Walmart misappropriated trade secrets in violation of the common law and the Texas Uniform Trade Secrets Act. As *Killick* held about these very causes of action, "the trier of fact would necessarily have to look at" the parties' confidentiality agreement to resolve those claims. 2020 WL 7639575, at *4.

The common law requires Fintiv to establish: "(1) a trade secret existed; (2) the trade secret was acquired through a breach of a confidential relationship or was discovered by improper means; (3) the defendant used the trade secret without

the plaintiff's authorization; and (4) the plaintiff suffered damages as a result." *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 366-67 (Tex. App.—Dallas 2009, pet. denied); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 769 (Tex. 1958). Similarly, to succeed under the statute, Fintiv must establish, among other things, that the defendant: (1) knew or had reason to know that the trade secret was acquired by improper means; or (2) disclosed or used a trade secret without express or implied consent, where the trade secret was acquired by improper means or there was a duty to maintain its secrecy or limit its use. TEX. CIV. PRAC. & REM. CODE § 134A.002(3)(A)-(B).[2] The statute in turn defines

[2] This portion of § 134A.002(3) of the Texas Civil Practice and Remedies Code provides that "misappropriation" includes:

> (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by *improper means*; or
> (B) disclosure or use of a trade secret of another *without express or implied consent* by a person who:
> (i) used *improper means* to acquire knowledge of the trade secret; [or]
> (ii) at the time of disclosure or use, knew or had reason to know that the person's knowledge of the trade secret was:
> (a) derived from or through a person who used *improper means* to acquire the trade secret;
> (b) acquired under circumstances giving rise to a *duty to maintain the secrecy of or limit the use of the trade secret*; or
> (c) derived from or through a person who owed *a duty to the person seeking relief to maintain the secrecy of or limit the use of the trade secret*.

"improper means" to include "breach or inducement of a breach of a duty to maintain secrecy, to limit use, or to prohibit discovery of a trade secret," as well as "theft, bribery, misrepresentation, . . . or espionage." *Id.* § 134A.002(2).

Two legal elements of Fintiv's claims require examining the Non-Disclosure Agreement. For one, Fintiv must show lack of authorization or consent—as Fintiv has conceded. *See Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 366; TEX. CIV. PRAC. & REM. CODE § 134A.002(3)(B). (Appellee's Brief at 35, 39-40, *Walmart Inc. v. Fintiv, Inc.*, No. 06-20-00071-CV (Jan. 20, 2021) ("Fintiv 2021 Appellee's Br.")[3]) A court therefore must ask whether the Non-Disclosure Agreement authorizes Walmart's alleged conduct. (*See* MR 1188 (live pleading alleging lack of authorization or consent)) For example, the Non-Disclosure Agreement permits disclosure of information if more than three years have passed since the end of unsuccessful negotiations. (MR 269) Disclosure also is permitted if the information "becomes available to the public through no fault of the Recipient or its Representatives." (MR 269)

(emphases added). The statute also includes misappropriation of a trade secret acquired by accident or mistake (*id.* § 134A.002(3)(B)(iii)), but Fintiv has alleged no accident or mistake. (MR 1189-90)

[3] *Available at* https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=0aeb66c4-5a42-4536-85d0-98b10b1687cd&coa=coa06&DT=Brief&MediaID=894ea4c9-1fb1-4367-a145-356bed1926ac.

For another, Fintiv's claims require a court to consider whether Walmart had a duty of confidentiality—as Fintiv has also acknowledged. (Fintiv 2021 Appellee's Br. at 39) Only then can the court decide whether Fintiv proved "breach of a confidential relationship," *Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 366, a "duty . . . to maintain the secrecy of or limit the use of the trade secret," § 134A.002(3)(B)(ii)(b), (c), or acquisition by "improper means" through "breach of a duty to maintain secrecy, to limit use, or to prohibit discovery of a trade secret," § 134A.002(2). And to determine whether Walmart had such a duty, the court must look to the Non-Disclosure Agreement setting out the parties' confidentiality obligations. While Fintiv has asserted that the parties had "a long-standing confidential relationship" (Fintiv 2021 Appellee's Br. at 40), nothing in its amended petition nor its briefing explains what besides the Agreement made its relationship with Walmart "confidential." (*Id.*; MR 1181) And more fundamentally, Fintiv ignores that no confidentiality duty could exist apart from the Non-Disclosure Agreement because that contract was the "entire agreement between the Parties" on that subject. (MR 271)

Thus, Fintiv's claims cannot "be maintained without reference to the contract." *Killick*, 2020 WL 7639575, at *4 (citing *Pinto*, 526 S.W.3d at 440). Fintiv's legal theory that Walmart used trade secrets without authorization and despite a duty of confidentiality "depend[s] on the existence of" the agreement and

turns on Walmart's "authority to act pursuant to that agreement." *Pinto*, 526 S.W.3d at 441. The agreement's "existence [and] terms" are thus "operative facts in the dispute." *Id.* at 440.

C. Fintiv's factual allegations depend on the Non-Disclosure Agreement.

Third, Fintiv's factual allegations would not exist without the Non-Disclosure Agreement. Courts have repeatedly held that a dispute arises from a contract when forming the contract is one link in the factual chain of events leading to the dispute. *See, e.g.*, *Bambu Franchising*, 2017 WL 4003428, at *3 ("claims arise from the business relationship that was struck through the agreement[]"); *SH Salon*, 632 S.W.3d at 658 ("[b]ut for the commercial lease between these two parties, the claim would not exist"); *Stevenson v. Roberts*, No. 14-20-00075-CV, 2021 WL 2460577, at *4-5 (Tex. App.—Houston [14th Dist.] June 17, 2021) (plaintiff's tort claims arose from the contract hiring him as a driving instructor, because he "would not have been serving as [the student's] instructor at the time of the accident" but for the contract).

Here, too, the contract is a factual predicate for the dispute. Fintiv employees testified that under company policy and practice Fintiv would not have shared trade secrets with Walmart without a Non-Disclosure Agreement. (MR 859 (Tr. 95:19-25), 870 (Tr. 152:1-7), 876-77 (Tr. 53:13-54:5)) And the Non-Disclosure Agreement itself declares that Fintiv and Walmart "agree[d] to exchange . . .

Confidential Information . . . *subject to* the terms and conditions of this Agreement." (MR 268) (emphasis added)

Because Fintiv's witnesses have testified that the information exchange at issue in this dispute "would not have occurred as alleged" had the parties not entered into the Non-Disclosure Agreement, "the dispute . . . would not exist but for" the agreement. *Pinto*, 526 S.W.3d at 440. And because that information exchange depended on the execution of the Non-Disclosure Agreement, "the existence" of the agreement is an "operative fact[] in the dispute." *Id.* at 440.

II. Fintiv cannot evade the forum-selection clause.

Fintiv has attempted several end-runs around the forum-selection clause. None should succeed.

A. Artful pleading cannot avoid the forum-selection clause.

According to Fintiv, this dispute does not arise from the Non-Disclosure Agreement because Fintiv fashioned its claims as resting on the common law and the Texas Uniform Trade Secret Act, not the Non-Disclosure Agreement. (MR 248-250; 1377-81) But the Texas Supreme Court has forbidden "attempts to evade enforcement of forum selection agreements through artful pleading." *Pinto*, 526 S.W.3d at 440 (citation and quotation marks omitted). A plaintiff cannot simply "characterize its claim as a statutory or common-law tort claim to evade the agreed-upon forum." *Id.*

Fintiv has attempted just such artful pleading. Its original petition stated the obvious: "*[t]his action arises from* Walmart's infringement and misappropriation of Fintiv's trade secrets and confidential information Fintiv shared with Walmart *under a series of binding nondisclosure agreements* in the years 2000, 2008, and 2011." (MR 3 (emphases added)) Fintiv tried to walk back that acknowledgment at the eleventh hour, filing an amended petition scrubbed of most references to the Non-Disclosure Agreement. (MR 1181, 1206-07) *Killick* rejected the same maneuver: the plaintiff amended its petition to remove references to the contracts, but that amendment could not defeat the forum-selection clause because resolving the trade-secret claims still required examining the contracts. 2020 WL 7639575, at *4. Here, too, Fintiv cannot plead around the agreement's factually and legally essential role in the dispute. Indeed, the agreement is so key to the claims that even Fintiv's amended petition could not avoid mentioning it. (MR 1181)

Nor can Fintiv evade the forum-selection clause by arguing its causes of action do not require a confidentiality agreement. *Pinto* rejected that very tactic. There, the Texas Supreme Court recognized that a company and its shareholders "can have relationships without an agreement like the one at issue," and that someone else "might be able to assert" similar causes of action "even without [an] agreement." *Pinto*, 526 S.W.3d at 441. But a court "cannot ignore the reality that an agreement, in fact, governs [the parties'] relationship" and the "alleged grievances emanate

from" that agreement. *Id.* That is, the plaintiff cannot live in "a hypothetical world where the agreement does not exist." *Id.* at 439. If, as here, an agreement exists, its forum-selection clause cannot be ignored in deciding the proper forum. *Id.* at 441.

Relatedly, Fintiv also cannot evade the forum-selection clause by accusing Walmart of violating the common law and a statute rather than the contract. *Pinto* rejected the idea that "when a claim arises out of 'general obligations imposed by law,' it cannot arise out of the contract." *Id.* at 442. What matters is "the substance of the claims, not the labels." *Id.* at 441. *Killick* applied that principle in the very circumstances presented here: although the plaintiff tried to craft its trade-secret claims to be non-contractual, they still arose in substance from the parties' confidentiality agreements. 2020 WL 7639575, at *4; *supra* at 33-34.

What's more, Fintiv's "statutory and common-law tort claims involve the same operative facts that would be implicated in a parallel breach-of-contract claim, had one been pursued"—which reinforces that the dispute arises out of the contract. *Pinto*, 526 S.W.3d at 441. Fintiv claims that Walmart "acquired, disclosed, and used" Fintiv's trade secrets. (MR 1190) The same allegation could have been pursued in a suit for breach of the Non-Disclosure Agreement, which governs how each party may "disclose" and "use" confidential information acquired from the other. (MR 269) Fintiv "'chose, as was [its] right, not to seek a contractual

remedy,'" but that "cannot 'evade enforcement'" of the forum-selection clause. *Pinto*, 526 S.W.2d at 441 (citations omitted).

B. Fintiv's arguments about subsets of its allegations cannot avoid the forum-selection clause.

Fintiv argues that on some occasions when it allegedly shared information, the Non-Disclosure Agreement's confidentiality provisions were inapplicable. (Fintiv 2021 Appellee's Br. at 32-38, 40-41, 44-46) These arguments about subsets of the alleged trade-secret disclosures in this case—disclosures after confidentiality obligations expired and disclosures to MCX—cannot change the forum-selection analysis and are groundless in any event.

1. The dispute as a whole arises from the Non-Disclosure Agreement even assuming some allegations do not.

The forum-selection clause applies even if, as Fintiv contends, the agreement's confidentiality provisions do not govern some of the information Fintiv allegedly shared. The clause requires that the "dispute" be brought in Arkansas if it "aris[es] from" the agreement. (MR 271 (¶ 8)) A dispute can arise from an agreement even if not all factual allegations involve the agreement—as Fintiv has never contested. The term "dispute" is "broad[]," capturing more than just "claims based solely on rights originating exclusively from the contract." *Pinto*, 526 S.W.3d at 439. For example, in *Pinto*, the dispute arose out of a shareholder agreement even though the claims turned partly on a subsequent company acquisition rather than the

agreement. *Id.* at 433, 440-42. So too in *Killick*, where the suit arose out of agreements to distribute aircraft parts even though the claims turned partly on separate allegations about "employees leaving their employer for a competitor." 2020 WL 7639575, at *1, *4. As the Texas Supreme Court explained, but-for causation "literally embraces every event that hindsight can logically identify in the causative chain." *Pinto*, 526 S.W.3d at 438 (citation and quotation marks omitted).

Likewise, this dispute as a whole arises from the Non-Disclosure Agreement, even assuming the claims also turn partly on allegations separate from the agreement. Take Fintiv's contention that the Agreement's confidentiality provisions expired after a certain point (after 2010 or after 2013). (Fintiv 2021 Appellee's Br. at 33, 40) That is immaterial because this suit is not limited to post-2010 or post-2013 disclosures. Fintiv is also suing over disclosures between 2008 and 2010. (*E.g.*, MR 1186 (live pleading)) And Fintiv has never contested that those disclosures are governed by the Agreement's confidentiality provisions. Likewise, this suit is not limited to information allegedly shared with MCX. Fintiv also alleges Walmart obtained information "directly" from Fintiv. (MR 1188-89) Resolving this dispute as a whole thus requires addressing the agreement.

2. Fintiv's arguments about the expiration of the confidentiality provisions fail for multiple additional reasons.

Fintiv's arguments about expiration timing also fail on their own terms. Fintiv's expiration arguments have been convoluted, but its principal theory is that

the Non-Disclosure Agreement expired in 2013, so meetings between the parties after 2013 were not subject to the Agreement. (*E.g.*, MR 248) That theory has multiple flaws.

To begin, Fintiv mixes up the Agreement's confidentiality provisions with its forum-selection clause. Fintiv's arguments about expiration rely on the clause of the Agreement providing that *non-disclosure obligations* expire "three (3) years from the cessation of unsuccessful negotiations." *Supra* at 18. (MR 269) But that says nothing about the forum-selection clause, which is in a separate section and has no expiration date. (MR 271) A forum-selection clause without an expiration date remains enforceable even after other provisions expire. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Expl. & Prod., Inc.*, 234 S.W.3d 679, 691 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Thus, whether Fintiv is right that the confidentiality provisions expired after 2013 has no effect on its continuing obligation to adhere to the forum-selection clause.

Fintiv's theory fails on the law in any event. Fintiv contends that the Agreement's confidentiality provisions expired in 2013, and that the parties' discussions continued after 2013. Both cannot be true. The confidentiality obligations extend three years "from the cessation of unsuccessful negotiations." (MR 269) The parties' negotiations did not cease if, as Fintiv asserts, they continued through 2014.

In the first appeal, Fintiv suggested that, although the parties' negotiations may not have ceased, they ended a "proposed business relationship" in 2010 and later began a new one. (*See* Fintiv 2021 Appellee's Br. at 46]) But nothing in the expiration clause turns on the parties' proposed business relationship. (MR 269) Instead, Fintiv takes that language from one of the contract's recitals (MR 268), but "a contract's recitals are not strictly part of the contract." *Kartsotis v. Bloch*, 503 S.W.3d 506, 518 (Tex. App.—Dallas 2016, pet. denied). "'[R]ecitals, especially when ambiguous, cannot control the clearly expressed stipulations of the parties.'" *Country Cmty. Timberlake Vill., L.P. v. HMW Special Util. Dist. of Harris*, 438 S.W.3d 661, 669 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (citation omitted). The recital Fintiv cites is untethered to the operative expiration clause, and Fintiv admits the recital is ambiguous, as the "proposed business relationship is undefined." (Fintiv 2021 Appellee's Br.at 46)

Moreover, even if the parties' proposed business relationship were relevant to expiration, Fintiv fails to show it ended in 2010. Fintiv's interpretation rests on a draft agreement from 2011, which supposedly shows the parties thought the prior relationship was over. (Fintiv 2021 Appelle's Br. at 41) But there is no evidence Walmart ever signed that draft, which thus can shed no light on the interpretation of the 2008 Agreement. (MR 58)

Even setting all that aside, Fintiv's post-2013 expiration argument fails on the facts. The record cannot support Fintiv's premise that the parties held post-2013 meetings. Fintiv's own witnesses testified that no post-2013 meetings occurred. (MR 826-28, MR 863 (Tr. 111:8-10), 869 (Tr. 141:23-25), 888 (Tr. 98:16-23), 1087-90, 1177) And Fintiv's own interrogatory responses identified no such meetings. (MR 898-99, 909-10.) Fintiv has pointed only to two record fragments, neither of which identifies post-2013 meetings, let alone post-2013 trade-secret disclosures. (Fintiv 2021 Appellee's Br. at 23, 51) The first—a witness's "belief" that Aaron Kribs and his Walmart colleagues were meeting with Fintiv "up until" January 2014—identifies no 2014 meeting. (MR 972) And Kribs himself clarified no meetings occurred in 2014. (MR 1178) The other statement Fintiv invokes is not even about Walmart, nor does it establish any post-2013 meeting: the witness testified merely that Fintiv and *MCX* had "ongoing discussions" until MCX chose another vendor in February 2014. (MR 1031-32 (Tr. 113:6-114:10))

Finally, Fintiv also asserted in passing in the prior appeal that those provisions expired even earlier, in 2010, when Walmart selected Obopay over Fintiv for a mobile-wallet project. (Fintiv 2021 Appellee's Br. at 40-41, 46) That argument has no support. Fintiv identifies no operative contract provision that would make the confidentiality obligations expire in 2010. As explained, the expiration provision extends the confidentiality obligations for three years after the cessation of

unsuccessful negotiations. *See supra* at 18, 45-46. (MR 269) And by Fintiv's own account, the parties continued their discussions after 2010. (MR 898-99, 909)

3. Fintiv's arguments about MCX fail for multiple additional reasons.

Fintiv also tries to escape the forum-selection clause by alleging that Walmart obtained Fintiv's trade secrets in part through a third party, MCX, which supposedly acted as Walmart's agent. The Non-Disclosure Agreement's forum-selection clause is inapplicable, Fintiv's theory goes, because MCX was not bound by the Non-Disclosure Agreement. That theory fails on its own terms several times over.

a. Even assuming MCX acted as Walmart's agent, that would not avoid the Non-Disclosure Agreement.

To begin, even accepting *arguendo* Fintiv's defective agency theory, Fintiv's MCX theory fails for two reasons.

First, the Non-Disclosure Agreement covers information received by Walmart through one of its "agents." (MR 268-69 (¶ 1)) The Agreement governs confidential information "received by the Recipient or its Representatives," and it defines "Representatives" to include the "agents of each party." (*Id.*) So if Fintiv were right that MCX was Walmart's agent, Fintiv would be wrong that information received by Walmart through MCX is beyond the Non-Disclosure Agreement.

Second, the forum-selection clause governs disputes between Fintiv and Walmart, without regard to MCX's rights or obligations. (MR 271) Fintiv sued

Walmart, not MCX, so Fintiv must adhere to the terms of its relationship with Walmart. *See Pinto*, 526 S.W.3d at 433 (plaintiff bound by forum-selection clause in agreement between plaintiff and defendant).

b. In any event, MCX was not Walmart's agent

Regardless, Fintiv's MCX theory fails because Fintiv must establish that MCX was Walmart's agent, which it cannot do. "Texas law does not presume agency, and the party who alleges it has the burden of proving it." *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007); *see Sunergon Oil, Gas & Mining Grp., Inc. v. Cuen*, No. 01-19-00998-CV, 2021 WL 3775589, at *4-5 (Tex. App.—Houston [1st Dist.] Aug. 26, 2021, no pet.) (applying that burden at the motion-to-dismiss stage). "An essential element of the principal-agent relationship is the alleged principal's right to control the actions of the alleged agent"—"not only the right to assign tasks, but also *the right to dictate the means and details* of the process by which an agent will accomplish the task." *Townsend v. Univ. Hosp.-Univ. of Colo.*, 83 S.W.3d 913, 921 (Tex. App.—Texarkana 2002, pet. denied) (emphasis added) (citations omitted). Fintiv failed to carry its burden of establishing an agency relationship.

Fintiv cannot show a principal-agent relationship based on "actual" authority, which must rest on "some communication by the principal . . . to the agent." *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007). Fintiv has no evidence of any

communication by Walmart to MCX establishing an agency relationship. In fact, the record refutes any notion that Walmart had the "right to dictate the means and details" of MCX's conduct. *Townsend*, 83 S.W.3d at 921. MCX was "a coalition of approximately 40 merchants representing nearly 80 brands, including a number of top retailers and restaurant companies in the United States." (MR 1166) That coalition was hardly controlled by a single participant. Rather, Walmart was but one of many participants in MCX with a minority interest in the company and no greater representation on MCX's board than several other minority investors. (MR 1086, 1095, 1166, 1542, 1558, 1616-23)

Unable to show actual authority, Fintiv asserts apparent authority. But apparent authority requires "evidence of conduct by a principal, relied upon by the party asserting apparent authority, which would lead a reasonably prudent person to believe an agent had authority to act for the principal." *Coffin v. Finnegan's, Inc.*, No. 06-01-00171-CV, 2003 WL 21756653, at *4 (Tex. App.—Texarkana July 31, 2003, no pet.) (citation and quotation marks omitted). Fintiv falls short multiple times over: it fails to show it relied on any representation from Walmart indicating a principal-agent relationship, it fails to show Walmart made any such representation in the first place, and in any event, it would not have been objectively reasonable for Fintiv to believe MCX was Walmart's agent.

Fintiv cannot show reliance because it knew MCX was not under Walmart's control. As shown above, Fintiv's witnesses testified that they understood that MCX was a consortium of many large retailers. And Fintiv's president, Michael Love, testified that he knew the MCX representatives he met with "weren't working for Walmart." (MR 1034-35 (Tr. 116:9-117:9)) It is therefore beside the point that Love claimed to view Walmart and MCX as "essentially one and the same" or confused the two companies' names at his deposition. (*See* MR 958, 962.) Regardless of those statements, Fintiv cannot show reliance because Love "absolutely" understood that MCX was "an independent company"—not under Walmart's control as to the means and details of its work. (MR 1122 (Tr. 56:4-6))

Fintiv also identifies no communication from Walmart to Fintiv that Walmart had control over the means and details of MCX's processes. *See Gaines*, 235 S.W.3d at 182. Fintiv asserted previously that Walmart "directed Mozido" to MCX "to continue discussions regarding Mozido's technology." (MR 957) But this says nothing about Walmart's control over MCX, let alone control over means and details. Instead, the witness confirmed that Walmart was merely "tr[ying] to facilitate" Fintiv's attempt "to get retained by MCX." (MR 1129 (Tr. 116:9-16.)) Fintiv thus has no evidence to meet its burden of showing that Walmart communicated apparent authority.

Finally, Fintiv's apparent authority allegations fail for yet another reason: it would not have been objectively reasonable for Fintiv to believe there was a principal-agent relationship. *See Gaines*, 235 S.W.3d at 182-83 ("[T]he standard is that of a reasonably prudent person, using diligence and discretion to ascertain the agent's authority."). Fintiv knew MCX was a consortium of major retailers. (MR 1121 (Tr. 55:9-24)) Indeed, Love testified that because the consortium was made up of "competitors," such as "Walmart/Target, Home Depot/Lowe's, McDonald's/Burger King," he "immediately thought MCX would probably not make it." (*Id.*) No "'reasonably prudent person'" would have believed Walmart controlled MCX. *Coffin*, 2003 WL 21756653, at *4 (citation omitted).

C. Walmart is a party to the Non-Disclosure Agreement.

Fintiv also contends the entire Non-Disclosure Agreement is inapplicable because it was signed by "Wal-Mart Stores, Inc." rather than "Walmart Inc." (Fintiv 2021 Appellee's Br. at 32) But "Wal-Mart Stores, Inc." and "Walmart Inc." are two names for the same corporation. (MR 368) Fintiv has even conceded elsewhere—including in its petition—that the 2008 Non-Disclosure Agreement was "executed by the parties" to this suit, "Fintiv and Walmart." (MR 244, MR 1179 n.1, 1181) Like Fintiv's other attempts to resist the forum-selection clause, its argument about Walmart's corporate name is meritless.

III. Mandamus is warranted because the forum-selection clause must be enforced.

Because the Non-Disclosure Agreement's forum-selection clause governs this dispute, the suit must be dismissed from Texas court. "Enforcement of forum-selection clauses is mandatory unless the party opposing enforcement 'clearly shows that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex. 2004) (per curiam) (quoting *In re AIU Ins. Co.*, 148 S.W.3d 109, 112 (Tex. 2004) (alterations omitted)). Fintiv has never attempted either showing. "The trial court was therefore required to enforce the forum-selection clause." *Id.* That error "is not harmless" and "is subject to automatic reversal," in part because "a trial in a forum other than that contractually agreed upon will be a meaningless waste of judicial resources." *In re AIU Ins. Co.*, 148 S.W.3d at 118. Mandamus is therefore warranted. *Id.* at 115-20; *In re AutoNation*, 228 S.W.3d at 667-68.

PRAYER

For these reasons, Walmart respectfully requests that the Court grant a writ of mandamus directing the trial court to dismiss all claims against Walmart. Walmart also requests all such further relief to which it is justly entitled.

Respectfully submitted,

Dated: MARCH 11, 2022

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**pro hac vice* pending

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CERTIFICATE OF COMPLIANCE AND RULE 52.3(j) CERTIFICATION

In accordance with Rule 9.4 of the Texas Rules of Appellate Procedure, I certify that:

This brief complies with the type-volume limitation of TEX R. APP. P. 9.4(i)(2)(B) because it contains 9,150 words as determined by the word-counting feature of Microsoft Word plus manually counting the words in the pictures of the Non-Disclosure Agreement, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

This brief complies with the typeface requirement of TEX R. APP. P. 9.4(e) because it has been prepared using Microsoft Word 2016 in Times New Roman 14-point font.

In accordance with Rule 52.3(j) of the Texas Rules of Appellate Procedure, I certify that I have reviewed the foregoing Petition and have concluded that every factual statement in the Petition is supported by competent evidence included in the appendix or record.

Dated: MARCH 11, 2022

/s/ Raffi Melkonian
Raffi Melkonian

AFFIDAVIT OF RAFFI MELKONIAN

STATE OF TEXAS §
§
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Raffi Melkonian, who after having been sworn by me, upon his oath deposed and said the following:

1. "My name is Raffi Melkonian. I am over eighteen (18) years of age and am fully competent to make this affidavit. The facts stated in this affidavit are true and correct and are based upon my personal knowledge.

2. "I am licensed to practice law in the state of Texas, and I am appellate counsel for Relator Walmart Inc. in this matter.

3. "The documents contained in the mandamus record and the appendix attached to Relator's Petition for Writ of Mandamus and Motion to Seal Volume IV of the Record are true and correct copies of every document filed in the underlying proceeding that is material to Relator's claim for relief, including but not limited to pleadings and exhibits filed by the parties, discovery served by the parties, documents produced by the parties, hearing transcripts, communications between the parties, and orders signed by the trial court

(including the order denying Relator's request for dismissal of the underlying proceeding based on the forum-selection clause).

4. I have reviewed the Petition for Writ of Mandamus filed on behalf of Relator in this matter and have concluded that the factual statements contained in the petition are supported by the mandamus record.

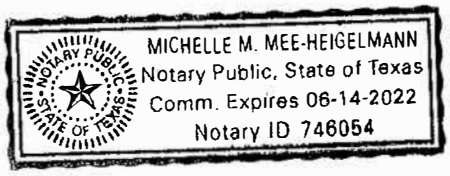
5. Further affiant sayeth not.

Executed in Harris County, Texas, on the 10th day of March, 2022.

Dated: March 10, 2021

Raffi Melkonian

SUBSCRIBED AND SWORN TO BEFORE ME on the 10th day of March 2021, certify which witness my hand and official seal.



Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Relator Walmart Inc.'s Petition for Writ of Mandamus has been forwarded electronically to all counsel of record and respondent on March 11, 2022:

Jeffrey M. Tillotson
TILLOTSON LAW
1807 Ross Ave, Suite 325
Dallas, TX 75201-8040

Attorney for Real Party in Interest Fintiv, Inc.

The Honorable Brad Morin
71st Judicial Court
Harrison County
200 West Houston Suite 219
Marshall, Texas 75670

Respondent

Dated: MARCH 11, 2022

/s/ Raffi Melkonian
Raffi Melkonian

APPENDIX

Appendix A:	Order Denying Walmart's Supplemental Motion to Dismiss
Appendix B:	2008 Mutual Confidentiality and Non-Disclosure Agreement
Appendix C:	Fintiv's Original Petition
Appendix D:	Fintiv's Amended Petition
Appendix E:	*Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428 (Tex. 2017)
Appendix F:	*In re Killick Aerospace Ltd.*, No. 02-20-00280-CV, 2020 WL 7639575 (Tex. App.—Ft. Worth Dec. 23, 2020, orig. proceeding)

Appendix A

Order Denying Defendant's Supplemental Motion to Dismiss (MR 1282)

CAUSE NO. 18-1378

FINTIV, INC.,	§	
	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
	§	
v.	§	
	§	**HARRISON COUNTY, TEXAS**
WALMART INC.	§	
	§	
Defendant.	§	
	§	**71st JUDICIAL DISTRICT**
	§	

ORDER DENYING DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS PURSUANT TO A MANDATORY FORUM SELECTION CLAUSE

On this day, the Court considered Defendant Walmart Inc.'s Supplemental Motion to Dismiss Pursuant to a Mandatory Forum Selection Clause. After considering the Motion, prior briefing, and any responses and exhibits attached thereto, if any, the Court is of the opinion that the Motion should be DENIED.

Defendant Walmart Inc.'s Supplemental Motion to Dismiss Pursuant to a Mandatory Forum Selection Clause is therefore DENIED.

SIGNED on this 1 day of Feb, 2022.

JUDGE PRESIDING

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Jeffrey Tillotson on behalf of Jeffrey M. Tillotson
Bar No. 20039200
swade@tillotsonlaw.com
Envelope ID: 60852214
Status as of 2/2/2022 7:57 AM CST

Associated Case Party: Fintiv, Inc.

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Appendix B

2008 Mutual Confidentiality and Non-Disclosure Agreement (MR 268-73)

MUTUAL CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

This Mutual Confidentiality and Non-Disclosure Agreement (this "Agreement") is made and entered into on this 18th day of September, 2008 (the "Effective Date"), by and between AFFINITY GLOBAL SERVICES, LLC ("**Company**"), and WAL-MART STORES, INC, a Delaware corporation. ("**Wal-Mart**"). Company and Wal-Mart shall be each individually referred to herein as a "**Party**" and collectively referred to herein as the "**Parties**".

WHEREAS, in connection with a proposed business relationship that requires that a Party (the "Disclosing Party") first deliver to the other Party (the "Recipient") certain Confidential Information (defined below) before entering into a potential business arrangement between the Parties (the "Services"); and

WHEREAS, the Parties agree to exchange, manage and maintain such Confidential Information for purposes of performing the Services subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the above-stated premises as well as other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Definitions:**

   a. "**Confidential Information**" shall mean information, whether written or oral, received by the Recipient or its Representatives (defined below) that relates to the Disclosing Party and is not generally available to the public, or which would reasonably be considered confidential and/or proprietary or which is marked "Confidential" or "Proprietary" by the Disclosing Party. Confidential Information includes without limitation (i) information relating to research, development, inventions, information systems, software code, software applications, pricing, customer lists, financial or other economic information, accounting, engineering, personnel relations, marketing, merchandising, and selling; customer or employee data or statistics, (ii) potential sources of financing and the related terms of such financing; (iii) all analyses, compilations, forecasts, studies or other documents relating to the above; and (iv) all other information, documentation or otherwise prepared in connection with the review, analysis and performance of the Services. In the event Confidential Information is the basis of, is incorporated into, or is reflected in other documents, whether separately or jointly generated by the Parties, such other documents shall be deemed Confidential Information subject to the terms of this Agreement.

   b. "**Representatives**" shall mean the respective directors, officers, employees, affiliates, associates, representatives (including, without limitation, financial

advisors, brokers, attorneys and accountants) or agents of each Party, whichever the case may be.

2. **Non-Disclosure Obligations.**

a) The Recipient, for a period beginning with the Effective Date, and continuing for three (3) years from the cessation of unsuccessful negotiations or the consummation of the Services (by execution of the relevant document(s)), whichever occurs first, shall maintain and protect the confidentiality of the Confidential Information with the same degree of care as is normally used in the protection of its own confidential and proprietary information but in no event with less than a reasonable standard of care. The Recipient further agrees not to use Confidential Information for any purpose, except for purposes related to the Services.

(b) The Recipient shall maintain and protect the confidentiality of the Disclosing Party's Confidential Information with the same degree of care as is normally used in the protection of its own confidential and proprietary information. Each Party further agrees not to use Confidential Information for any purpose, except as set forth herein or except as otherwise directed in writing by the Disclosing Party of such Confidential Information.

(c) Without the prior consent of the Disclosing Party, the Recipient will not direct or allow its Representatives to disclose to any unauthorized third party, including but not limited to the press: (i) discussions concerning the Services involving the Parties, (ii) the fact that either Party has requested or received Confidential Information from the Disclosing Party; or (iii) any of the terms, conditions or other facts with respect to the Services, including any of the terms of this Agreement or its existence.

(d) The Recipient shall limit access to the Confidential Information to those Representatives (i) who need to know such information solely for the purpose of developing or performing the Services; (ii) who have been informed of the confidential nature of such information; and (iii) who agree to act in accordance with the terms of this Agreement. Each Party shall cause their respective Representatives to observe the terms of this Agreement and shall be responsible for any breach of this Agreement by any of its Representatives. Each Party shall take all reasonable measures, including without limitations court proceedings, to restrain its Representatives from unauthorized disclosure of the Confidential Information.

(e) The restrictions set forth in this Section 2 shall not apply with respect to Confidential Information which (i) is already available to the public; (ii) becomes available to the public through no fault of the Recipient or its Representatives; (iii) is already known to the Recipient on a non-confidential basis, as shown by written records in the Recipient's possession at the time that the Confidential Information was received; or (iv) disclosures required by law.

3. **Proprietary Interest.** Nothing in this Agreement shall be construed to grant the Recipient a license to any Confidential Information disclosed to it by the Disclosing Party or to any patents, trademarks, copyrights or any other intellectual property derived from the Disclosing Party's Confidential Information.

4. **Disclosures Required By Law.** In the event either Party is required by law, regulation, stock exchange requirement or legal process to disclose any of the Confidential Information, the Recipient will promptly notify the Disclosing Party in writing prior to such disclosure. In such event, the Disclosing Party, at its own expense, may seek an appropriate protective order or waive compliance with the terms of this Agreement. In the notice, the Recipient shall provide sufficient details concerning the nature of such disclosure and reaffirm that if a disclosure must, in the opinion of its counsel, be made, it shall be limited solely to the information legally required to be disclosed.

5. **Return or Destruction of Confidential Information.** At the written request of the Disclosing Party, the Recipient agrees that it will promptly deliver to Disclosing Party all documents and other materials comprising Confidential Information, in the possession or under the control of Recipient or Recipient's Representatives, together with all copies and summaries thereof, and (ii) will destroy all materials generated or prepared by Recipient or Recipient's Representatives that include or refer to any part of the Confidential Information, including, without limitation, all analyses, compilations, summaries, studies, notes, machine readable archival copies of Confidential Information and other material without retaining a copy of any such materials. Alternatively, and providing the Disclosing Party provides its prior written consent, Recipient will destroy all documents and other materials constituting Confidential Information in the possession or under the control of the Recipient or Recipient's Representatives. Recipient agrees that if requested by Disclosing Party, an authorized officer of Recipient will certify to Disclosing Party in writing that all such information and materials have been delivered or destroyed in accordance with the terms of this Agreement. Notwithstanding the delivery or destruction of Confidential Information and related materials required by this Section 5, any and all duties or obligations existing under this letter will remain in full force and effect.

6. **Remedies.** The Parties acknowledge that remedies at law may be inadequate to protect them against any actual or threatened breach of this Agreement by the other Party, and without prejudice to any other rights and remedies otherwise available to either Party, the Parties agree that the non-defaulting Party shall be entitled to seek injunctive or other equitable relief as a remedy for any such breach. Such a remedy shall not be deemed to be the exclusive remedy for a breach of this Agreement but shall be in addition to all other remedies available to the non-defaulting Party at law or equity. In the event of litigation relating to this Agreement, the losing Party shall reimburse the prevailing Party their costs and expenses, including, without limitation, legal fees and expenses, incurred in connection with all such litigation.

7. **No Waiver.** The Parties agree that no failure or delay by either Party in exercising any right, power or privilege hereunder will operate as a waiver thereof; nor will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

8. **Choice Of Law.** The Parties mutually acknowledge and agree that this Agreement shall be construed and enforced in accordance with the laws of the state of Arkansas. The Parties agree and consent to the exclusive jurisdiction of the state and federal courts of Arkansas to resolve any dispute arising from this Agreement and waive any defense of inconvenient or improper forum.

9. **Entire Agreement.** This Agreement represents the entire agreement between the Parties concerning the subject matter of this Agreement. No modifications of this Agreement or waiver of the terms and conditions hereof will be binding upon the Parties unless approved in writing by each Party.

10. **Authorization.** Each of the undersigned individuals represent and warrant that he/she has the power and authority to enter into this Agreement and bind their respective companies as their authorized representatives.

11. **Titles.** The titles used herein are for convenience only and shall not be considered in construing or interpreting any of the provisions of this Agreement.

12. **Miscellaneous.** The Parties agree that this Agreement shall be binding upon the Parties, their Representatives, transferees, successors and assigns. The Parties shall not have the right to assign or transfer this Agreement or any rights or obligations hereunder to any other party without prior written consent of the other Party. The terms and provisions of this Agreement shall be deemed severable, and in the event that any term or provision hereof or portion thereof is deemed or held to be invalid, illegal or unenforceable, the remaining terms and provisions hereof and portions thereof shall nevertheless continue and be deemed to be in full force and effect.

13. **Costs and Liabilities.** Except for the breach of any terms of this Agreement, neither Party nor any of its Representatives will have any liability to the other Party.

14. **Notice.** No notice or other communication shall be deemed given unless sent in any of the manners, and to the persons, as specified in this paragraph. All notices and other communications hereunder shall be in writing and shall be deemed given: (a) upon receipt if delivered personally (unless subject to clause (b) or if mailed by registered or certified mail return receipt requested; (b) at noon on the business day after dispatch if sent by a nationally recognized overnight courier for next morning delivery; or (c) upon the completion of transmission (which is confirmed by telephone or by a statement generated by the transmitting machine) if transmitted by telecopy or other means of facsimile which provides

immediate or near immediate transmission to compatible equipment in the possession of the Recipient.

15. **Counterparts.** This Agreement may be signed in counterparts and each signed copy of this Agreement will be an original of this Agreement, but all the signed copies of this Agreement together will amount to one and the same Agreement. The Parties agree that copies of executed documents received via facsimile will be deemed to be originals for all purposes.

16. **Compliance with Regulation Fair Disclosure.** In connection with this Agreement and Wal-Mart's providing of Confidential Information to the Company, the Company and its Representatives will not violate Regulation Fair Disclosure. In the event that Wal-Mart becomes obligated to pay any penalties, damages or fines as a result of a judgment by a court of competent jurisdiction or the Securities and Exchange Commission and such payment obligation of Wal-Mart is due to the actions by the Company in connection with this Agreement, the Company will indemnify Wal-Mart for such penalties, damages or fines and the reasonable fees and expenses incurred in connection therewith.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date and year written above.

AFFINITY GLOBAL SERVICES, LLC	**WAL-MART STORES, INC.**
By: Robert W Blair	By: Jane J Thompson
Name: Robert W. Blair	Name: Jane J. Thompson
Title: SVP & General Counsel	Title: President, Financial Services

Approved as to legal terms only
by _____
Wal-Mart Legal Team
Date: 10/16/08

Appendix C

Fintiv's Original Petition (MR 2-12)

CAUSE NO. 18-1378

FINTIV, INC.	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
v.	§	HARRISON COUNTY, TEXAS
	§	
WALMART INC.	§	
	§	
Defendant.	§	_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DISCLOSURE

Plaintiff, Fintiv, Inc., formerly known as Mozido, Inc. ("Fintiv")[1], files its original petition against Defendant, Walmart Inc. ("Walmart"), and for cause of action respectfully shows as follows:

DISCOVERY LEVEL

1. Fintiv moves the Court to conduct discovery in accordance with a discovery control plan tailored to the circumstances of the suit, under Level 3 of Texas Rule of Civil Procedure 190.4.

STATEMENT OF RELIEF

2. Fintiv states in accordance with Texas Rule of Civil Procedure 47(c) that Fintiv seeks monetary relief over $1,000,000, excluding costs, prejudgment interest, and attorney's fees. Plaintiff reserves the right to amend this specific statement of relief as may become necessary.

PARTIES

3. Fintiv is a Delaware corporation with its principal office in Austin, Travis County, Texas.

[1] Fintiv, Inc. means and includes Fintiv, Inc. and all of its predecessor entities, including but not limited to, Mozido, Inc., Mozido, LLC, Affinity Global Services, LLC, and Mobile Media Group.

4. Defendant, Walmart Inc., is a Delaware corporation with its principal office located in Arkansas. Walmart Inc. is registered to transact business in Texas and may be served via its registered agent, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action because the amount in controversy exceeds the minimum jurisdictional limits of this Court. The Court has personal jurisdiction over the entity defendant, Walmart, because it is registered to transact business in Texas, has regularly transacted and continues to regularly transact business in Texas, derives substantial revenue from goods and services provided to Texas residents, and the torts and other purposeful acts and omissions alleged herein occurred in the State of Texas.

6. The Court has proper venue over the lawsuit under the general rule, Tex. Civ. Prac. & Rem. Code § 15.002(a)(1), because a substantial part of the events or omissions giving rise to Fintiv's claim occurred in Harrison County, Texas: Walmart maintains and operates numerous "Supercenters" in and around Harrison County, Texas, including Supercenter #918 located at 1701 East End Boulevard North, Marshall, Texas 75670; and, Walmart engaged in tortious acts and other purposeful acts by virtue of providing Walmart Pay to Harrison County, Texas, residents from its Supercenters located in and around Harrison County, Texas, which caused serious harm and damage to Fintiv.

SUMMARY

7. This action arises from Walmart's infringement and misappropriation of Fintiv's trade secrets and confidential information Fintiv shared with Walmart under a series of binding non-disclosure agreements in the years 2000, 2008, and 2011 (collectively, "Fintiv-Walmart NDAs" and individually "the 2000 NDA", "the 2008 NDA", and "the 2011 NDA").

8. During a long-standing business relationship, Fintiv, a multinational mobile commerce and payments solutions company, provided Walmart with access to confidential intellectual property developed by Fintiv after years of research and investing tens of millions of dollars. This valuable and confidential intellectual property included business information, technical information, trade secret information, engineering information, economic information, design information, market information, studies, and other technical know-how. While leading Fintiv to believe it was partnering with Walmart, Walmart secretly and wrongfully misappropriated Fintiv's trade secrets and confidential information and commercially exploited it for its own gain, generating for itself, at Fintiv's expense, billions of dollars in value. By this action, Fintiv seeks to recover the damages it has suffered from Walmart's unjust misconduct in using Fintiv's trade secrets and confidential information without license, permission or payment.

9. Over the course of many years, Fintiv invested tens of millions of dollars in research and development, including research into mobile payment technology. At the core of Fintiv's digital commerce technology is Fintiv's proprietary MoTEAF™ (Mobile Transaction Ecosystem Architecture Framework), a plug-and-play technology platform designed to support the various technology and process platforms using open application programming interfaces ("APIs").

10. Fintiv and Walmart jointly scoped a mobile wallet, called MWallet, which utilized MoTEAF™ as a means to extend Walmart Financial Services product offerings to mobile payments. Fintiv disclosed its intellectual property and/or proprietary trade secrets to Walmart under the Fintiv-Walmart NDAs. As part of jointly scoping MWallet, Fivtiv hosted several meetings at Walmart headquarters (explained in more detail below) that were attended by senior Walmart executives, including then President of Walmart Financial, Jane Thompson.

11. Unbeknownst to Fintiv, however, Walmart was working with a different mobile wallet company, which Walmart eventually chose to hire.

12. Walmart launched Walmart Pay which utilizes Fintiv's proprietary and confidential mobile payment intellectual property, trade secrets and know-how, which Fintiv developed at a cost of tens of millions of dollars. Walmart induced Fintiv to disclose to Walmart its intellectual property, trade secrets and know-how by falsely representing to Fintiv that it intended to enter into a partner with Fintiv. Walmart never partnered with Fintiv, but instead misappropriated Fintiv's trade secrets, confidential information, and know-how to form the basis of Walmart's knowledge in the mobile payment technology area. Walmart now earns millions of dollars based on Walmart Pay.

13. Walmart has confirmed the value of mobile payments technology. Within six months of its launch, Walmart Pay was available in all of Walmart's 4,600+ stores in the United States.

14. Fintiv brings this action seeking full and fair compensation for Walmart's unlawful use of its intellectual property.

BACKGROUND FACTS

A. Fintiv and Mobile Wallet Technology

15. Founded in 2000, Fintiv is a multinational technology company that designs, develops, and provides mobile commerce and payment solutions globally.

16. Fintiv's cloud-based technology delivers payments and mobile loyalty solutions to companies in retail, financial services, consumer packaged goods and telecom that serve both banked and unbanked consumers worldwide via the mobile phone.

17. Fintiv launched the Trumpet Mobile Wallet in 2007, the first mobile wallet in the United States, and became the first company to conduct international mobile money transfers

over the Western Union network. https://www.quora.com/What-is-known-about-Mozido-Is-this-mobile-payment-provider-ready-to-go-public-in-2016.

18. Fintiv's digital commerce technology is based on MoTEAF™ (Mobile Transaction Ecosystem Architecture Framework), a plug-and-play technology platform designed to support the various technology and process platforms using open APIs.

19. Fintiv amassed valuable and confidential trade secrets and know-how about, including but not limited to, how to develop and launch mobile payment technology, including but not limited to, mobile wallets.

20. Fintiv has (at all times) taken reasonable measure to protect the secrecy of its trade secrets, confidential information, and know-how.

21. Fintiv trade secrets, confidential information, and know-how are not public and are not readily ascertainable – and derive independent economic value from not being known or readily ascertainable.

B. Fintiv Enters Non-Disclosure Agreement(s) with Walmart

22. Mobile Media Group (a corporate predecessor to Fintiv) was first introduced to Walmart in 2000.

23. Walmart desired to provide and/or does provide mobile financial services to Walmart customers.

24. Fintiv and/or its corporate predecessors entered several non-disclosure agreements with Walmart, including but not limited to, the Fintiv-Walmart NDAs.

25. The 2011 NDA defines Fintiv's "Confidential Information" as follows:

> Without limiting the generality of the foregoing, Confidential Information includes (i) information relating to any research, development, inventions, information systems, software code, software applications, financial or other economic information, accounting, engineering, personnel relations, marketing, merchandising, selling, strategic

plans and objectives; (ii) potential sources of financing; and (iii) all analyses, compilations, forecasts, studies or other documents prepared in connection with the review and possible consummation of the Engagement and the objective to be achieved thereby.

26. The 2011 NDA prohibits Walmart from using or disclosing Fintiv's Confidential Information, including its trade secrets, as follows:

> Receiving Party... shall maintain and protect the Disclosing Party's Confidential Information with the same degree of care as is normally used in the protection of the Receiving Party's own confidential and proprietary information. Each party further agrees not to use Confidential Information for any purpose, except as set forth herein.

27. Walmart agreed to be bound by all terms and conditions in the Fintiv-Walmart NDAs.

C. Fintiv Designs And Develops Walmart's First Mobile Wallet

28. After entering the Fintiv-Walmart NDAs, Fintiv presented a global wireless vision, the origin of MoTEAF™, to Walmart.

29. Fintiv hosted a meeting with senior Walmart executives at Walmart's headquarters in Bentonville, Arkansas, to discuss a possible mobile virtual network provider ("MVNO") within Walmart. Attendees at this meeting included Doug McMillon (at the time, General Manager in Home Entertainment at Walmart; currently serving as President and Chief Executive Officer at Walmart), Allen Henri (at the time, Manager of Prepaid and Postpaid Wireless Business at Walmart; currently serving as the Senior Director of Mobile Services and Field Operations at Walmart) along with representatives from NTT DoCoMo, Inc. ("NTT"), a large mobile provider at the time.

30. At this meeting, Doug McMillon stated that "everything we know in mobile is because of Mozido."

31. Pursuant to authorization from John Fleming (at the time, EVP Chief Merchandising Officer at Walmart), Fintiv created a mobile wallet for Walmart ("MWallet") with a plan to launch after a thorough scoping.

32. Fintiv created and delivered to Walmart the MWallet proprietary business model and product offering.

33. Subsequently, intense scoping by Walmart of MWallet commenced, and Scott Sandlin (at the time, Executive – Head of Financing, Protection, and Home Services at Walmart) was appointed as the point person for Walmart Multi-Channel Committee and Walmart Financial Services.

34. Fintiv subsequently held a follow-up meeting with Telefonica in Bentonville, Arkansas, which was attended by Jane Thompson (at the time, President at Walmart Financial Services), Scott Sandlin, Aaron Kribs (at the time, Senior Manager Health & Wellness – Multi-Channel Innovation & Strategy at Walmart), Mike Cook (Vice President & Assistant Treasurer at Walmart), Daniel Eckert (at the time, Vice President of Financial Services at Walmart; currently serving as Senior Vice President of Walmart Services and Digital Acceleration at Walmart), and Mike Zeher, Jr. (Senior Director of Treasury Operations at Walmart) among numerous other Walmart executives.

35. During the presentation, Mike Cook raised his hand to ask "what is a mobile wallet?"

36. Mike Cook would go on to be named "The Most Powerful Man in Payments" by MIT Technology Review less than three years later. https://www.technologyreview.com/s/427358/the-most-powerful-man-in-payments/

37. After the Telefonica meeting in Bentonville, Jane Thompson and Fintiv held a meeting to review and prepare for the Walmart MWallet product offering and launch.

38. Fintiv engaged in detailed scoping sessions with Walmart and plans were made for the launch of MWallet.

39. Still later, Fintiv gave Walmart a comprehensive presentation about its proprietary MoTEAF™ technology platform integrating a full suite of functionalities in mobile payment, shopping, marketing, and transaction-based analytics. This comprehensive presentation set forth a detailed overview of MoTEAF™, how it could be implemented within Walmart, and the benefits Walmart would reap once implemented. This presentation included Fintiv's confidential and proprietary information protected by trade secret.

40. Fintiv gave Walmart a subsequent comprehensive technology presentation to Walmart, further detailing how to implement MoTEAF™. This presentation included Fintiv's trade secrets and confidential information.

D. Walmart Misappropriates Fintiv's Trade Secrets And Confidential Information

41. Walmart pretended to partner with Fintiv in launching MWallet, drained Fintiv of its trade secrets, and ultimately backed out of its partnership with Fintiv and launched Walmart Pay using stolen trade secrets.

42. By July 6, 2016, Walmart Pay was available in the more than 4,600 Walmart stores nationwide, and 88% of Walmart Pay transactions came from repeat Walmart Pay customers. https://news.walmart.com/2016/07/06/walmart-pay-now-available-in-all-walmart-stores-nationwide.

43. Prior to Fintiv, Walmart had no knowledge or information regarding mobile wallets.

44. Walmart created Walmart Pay using Fintiv's trade secrets, confidential information, and know-how.

45. Following the release of Walmart Pay, Fintiv learned that Walmart Pay includes Fintiv's trade secrets, confidential information, and know-how.

46. Walmart earns millions of dollars from mobile payments, including Walmart Pay.

47. Fintiv never authorized or consented to Walmart's acquisition by improper means, disclosure, or use of its trade secrets.

48. Walmart did not compensate Fintiv for use of Fintiv's trade secrets and/or confidential information.

49. Walmart's misappropriation of Fintiv's trade secrets has injured Fintiv, has caused financial damage and irreparable harm to Fintiv.

CAUSE OF ACTION:
Misappropriation of Trade Secrets Common Law / TUTSA

50. Fintiv re-alleges and incorporates by reference the allegations of the preceding paragraphs of this Original Petition as if fully set forth herein.

51. The trade secrets owned by Fintiv and improperly acquired by Walmart include information and know-how related to the implementation and maintenance of mobile financial services.

52. Fintiv's trade secrets were not public. Fintiv's trade secrets relate to products and services used, sold, shipped and/or ordered, or intended to be used, sold, shipped and/or ordered, in interstate or foreign commerce.

53. Fintiv takes reasonable measures to maintain their secrecy by, among other things, requiring employees to sign confidentiality and non-disclosure agreements, by restricting access to its trade secrets, and by requiring a password login to access its trade secrets.

54. Fintiv's trade secrets derive independent economic value from not being generally known to, and not readily ascertainable through proper means by, another person or entity who could obtain economic value from the disclosure or use of the information.

55. Walmart improperly acquired Fintiv's trade secrets under the pretense of launching a business venture.

56. Walmart improperly used Fintiv's trade secrets in its technical and business models, including, without limitation, the development and launch of Walmart Pay.

57. Walmart's misappropriation of Fintiv's confidential, proprietary, and trade secret information was intentional, knowing, willful, malicious, fraudulent, and oppressive.

58. Walmart knew when it acquired, disclosed, and used Fintiv's trade secrets that it had acquired those secrets by improper means.

59. Fintiv never authorized or consented to Walmart's acquisition by improper means, disclosure, or use of its trade secrets.

60. Walmart has acquired, disclosed, and used the misappropriated trade secrets to unjustly gain market share and commercial advantage.

61. Walmart's misappropriation of Fintiv's trade secrets has injured Fintiv, has caused financial damage to Fintiv, and will continue to injure and cause financial damage to Fintiv unless enjoined by this Court. Fintiv, therefore, is entitled to injunctive relief against and to recover damages from Walmart for violation of the Texas Uniform Trade Secrets Act, Tex. Civ. Prac. & Rem. Code § 134A.001 et seq., and for breach of the common law.

62. In addition, Fintiv also seeks exemplary damages for Walmart's willful and malicious misappropriation of Fintiv's trade secrets, under Tex. Civ. Prac. & Rem. Code § 134A.004.

JURY DEMAND

63. Fintiv demands a jury trial and tenders the appropriate fee with the filing of this petition.

PRAYER FOR RELIEF

64. For these reasons, Plaintiff, Fintiv, Inc., requests that Defendant, Walmart Inc., be cited to appear and answer, and that on final trial Plaintiff have judgment for its actual and exemplary damages; injunctive relief; prejudgment and post judgment interest and costs of court; and such other and further relief, general or special, whether at law or in equity, to which it may show itself justly entitled.

REQUEST FOR DISCLOSURE

65. Under Texas Rule of Civil Procedure 194, Plaintiff requests Defendant disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

Dated: December 14, 2018

Respectfully submitted,

By: _____

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ATTORNEYS FOR PLAINTIFF

A TRUE COPY
of the Original hereof, I certify
Sherry Griffis
District Court Clerk
Harrison County, Texas
By _____
Deputy Clerk

Appendix D

Fintiv's Amended Petition (MR 1179-91)

Filed 7/22/2020 8:39 PM
Sherry Griffis
District Clerk
Harrison County, Texas
Heather Henigan
Deputy

CAUSE NO. 18-1378

FINTIV, INC.,	§	**IN THE DISTRICT OF**
Plaintiff,	§	
v.	§	**HARRISON COUNTY, TEXAS**
WALMART INC.,	§	**71ST JUDICIAL DISTRICT**
Defendant.	§	

PLAINTIFF'S AMENDED PETITION

Plaintiff, Fintiv, Inc., formerly known as Mozido, Inc. ("Fintiv")[1], files its amended petition against Defendant, Walmart Inc. ("Walmart"), and for causes of action respectfully shows as follows:

DISCOVERY LEVEL

1. Fintiv moves the Court to conduct discovery in accordance with a discovery control plan tailored to the circumstances of the suit, under Level 3 of Texas Rule of Civil Procedure 190.4.

STATEMENT OF RELIEF

2. Fintiv states in accordance with Texas Rule of Civil Procedure 47(c) that Fintiv seeks monetary relief over $1,000,000, excluding costs, prejudgment interest, and attorney's fees. Plaintiff reserves the right to amend this specific statement of relief as may become necessary.

[1] Fintiv, Inc. means and includes Fintiv, Inc. and all of its predecessor entities, including but not limited to, Mozido, Inc., Mozido, LLC, Affinity Global Services, LLC, and Mobile Media Group.

PARTIES

3. Fintiv is a Delaware corporation with its principal office in Austin, Travis County, Texas.

4. Defendant, Walmart Inc., is a Delaware corporation with its principal office located in Arkansas. Walmart Inc. is registered to transact business in Texas and may be served via its registered agent, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201.

5. Fintiv is informed and believes that nonparty Merchant Customer Exchange ("MCX") is a Massachusetts limited liability company with offices in Dallas, Texas. Fintiv is informed and believes and thereupon alleges that at all times relevant herein, MCX acted with actual and apparent authority as Walmart's agent in its dealings with Fintiv. Accordingly, Walmart is legally responsible for and liable for MCX's actions.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action because the amount in controversy exceeds the minimum jurisdictional limits of this Court. The Court has specific jurisdiction over the entity defendant, Walmart, because it is registered to transact business in Texas, has regularly transacted and continues to regularly transact business in Texas, derives substantial revenue from goods and services provided to Texas residents, and engaged in the torts and other purposeful acts and omissions alleged herein in the State of Texas, either directly or through its agent, MCX, a Texas resident.

7. The Court has proper venue over the lawsuit under the general rule, Tex. Civ. Prac. & Rem. Code § 15.002(a)(1), because a substantial part of the events or omissions giving rise to Fintiv's claim occurred in Harrison County, Texas: Walmart maintains and operates

numerous "Supercenters" in and around Harrison County, Texas, including Supercenter #918 located at 1701 East End Boulevard North, Marshall, Texas 75670; and, Walmart engaged in tortious acts and other purposeful acts by virtue of providing Walmart Pay to Harrison County, Texas, residents from its Supercenters located in and around Harrison County, Texas, which caused serious harm and damage to Fintiv.

SUMMARY

8. Fintiv is a multinational mobile commerce and payments solutions company. This action arises from Walmart's infringement and misappropriation of Fintiv's trade secrets and confidential information Fintiv shared with Walmart, over the course of a lengthy relationship between the parties.

9. Fintiv and Walmart were first introduced in or about 2000, when Walmart was just beginning to explore the concept of mobile payments. Fintiv and Walmart entered into a non-disclosure agreement in 2008, which expired by its terms in December 2013.[2]

10. Fintiv is informed and believes and thereupon alleges that, in or about 2012, Walmart launched Merchants Customer Exchange ("MCX"), a consortium of retailers based out of Dallas and formed to develop a mobile payments product. Fintiv is informed and believes and thereupon alleges that Walmart exercised substantial control over MCX, including but not limited to controlling its board and maintaining overlapping employees. Fintiv is informed and believes and thereupon alleges that MCX was headquartered in Dallas during the time period relevant to this petition. In 2012, Walmart instructed Fintiv to continue the discussions regarding Fintiv's technology with MCX.

[2] The parties exchanged drafts of other NDAs in 2000 and 2011, which do not appear to have been fully executed.

11. At all times relevant herein, MCX acted as Walmart's agent, with actual and apparent authority to act on its behalf. As such, Walmart is legally responsible for and liable for its agent MCX's actions as alleged herein.

12. Numerous meetings between Fintiv and Walmart/MCX took place in Dallas over the court of the parties' relationship.

13. Over the course of its long-standing business relationship with Walmart and Walmart/MCX, Fintiv provided Walmart with access to confidential intellectual property developed by Fintiv after years of research and investing tens of millions of dollars. This valuable and confidential intellectual property included business information, technical information, trade secret information, engineering information, economic information, design information, market information, studies, and other technical know-how. While leading Fintiv to believe it was partnering with Walmart, Walmart secretly and wrongfully misappropriated Fintiv's trade secrets and confidential information and commercially exploited it for its own gain, generating for itself, at Fintiv's expense, billions of dollars in value. By this action, Fintiv seeks to recover the damages it has suffered from Walmart's unjust misconduct in using Fintiv's trade secrets and confidential information without license, permission or payment.

14. Over the course of many years, Fintiv invested tens of millions of dollars in research and development, including research into mobile payment technology. At the core of Fintiv's digital commerce technology is Fintiv's proprietary MoTEAF™ (Mobile Transaction Ecosystem Architecture Framework), a plug-and-play technology platform designed to support the various technology and process platforms using open application programming interfaces ("APIs").

15. Fintiv and Walmart jointly scoped a mobile wallet, called MWallet, which utilized MoTEAF™ as a means to extend Walmart Financial Services product offerings to mobile payments. Fintiv disclosed its intellectual property and/or proprietary trade secrets to Walmart/MCX in connection with this process. As part of jointly scoping MWallet, Fintiv hosted several meetings at Walmart headquarters (explained in more detail below) that were attended by senior Walmart executives, including then President of Walmart Financial, Jane Thompson. Fintiv and Walmart/MCX also met several times in Dallas, Texas.

16. Unbeknownst to Fintiv, however, Walmart was working with a different mobile wallet company, which Walmart eventually chose to hire.

17. Walmart launched Walmart Pay, which utilizes Fintiv's proprietary and confidential mobile payment intellectual property, trade secrets and know-how, which Fintiv developed at a cost of tens of millions of dollars. Walmart induced Fintiv to disclose to Walmart (and/or MCX) its intellectual property, trade secrets and know-how by falsely representing to Fintiv that it intended to enter into a partner with Fintiv. Walmart never partnered with Fintiv, but instead misappropriated Fintiv's trade secrets, confidential information, and know-how to form the basis of Walmart's knowledge in the mobile payment technology area. Walmart now earns millions of dollars based on Walmart Pay.

18. Walmart has confirmed the value of mobile payments technology. Within six months of its launch, Walmart Pay was available in all of Walmart's 4,600+ stores in the United States.

19. Fintiv brings this action seeking full and fair compensation for Walmart's unlawful use of its intellectual property.

BACKGROUND FACTS

A. Fintiv and Mobile Wallet Technology

20. Founded in 2000, Fintiv is a multinational technology company that designs, develops, and provides mobile commerce and payment solutions globally.

21. Fintiv's cloud-based technology delivers payments and mobile loyalty solutions to companies in retail, financial services, consumer packaged goods and telecom that serve both banked and unbanked consumers worldwide via the mobile phone.

22. Fintiv launched the Trumpet Mobile Wallet in 2007, the first mobile wallet in the United States, and became the first company to conduct international mobile money transfers over the Western Union network. https://www.quora.com/What-is-known-about-Mozido-Is-this-mobile-payment-provider-ready-to-go-public-in-2016.

23. Fintiv's digital commerce technology is based on MoTEAF™ (Mobile Transaction Ecosystem Architecture Framework), a plug-and-play technology platform designed to support the various technology and process platforms using open APIs.

24. Fintiv amassed valuable and confidential trade secrets and know-how about, including but not limited to, how to develop and launch mobile payment technology, including but not limited to, mobile wallets.

25. Fintiv has (at all times) taken reasonable measure to protect the secrecy of its trade secrets, confidential information, and know-how.

26. Fintiv trade secrets, confidential information, and know-how are not public and are not readily ascertainable – and derive independent economic value from not being known or readily ascertainable.

B. Fintiv and Walmart's Relationship Began in 2000

27. Mobile Media Group (a corporate predecessor to Fintiv) was first introduced to Walmart in 2000.

28. Walmart desired to provide and/or does provide mobile financial services to Walmart customers.

29. Walmart executive Scott Sandlin was tasked with heading up Walmart's mobile payment efforts. Sandlin quickly concluded that Fintiv was the most knowledgeable player in the mobile payment industry. Years later, as the initiative gained traction within Walmart, Sandlin brought in another Walmart executive, Aaron Kribs, to lead Walmart's mobile payments initiative. Kribs also concluded that Fintiv was the most knowledgeable player in the industry, and recommended that Walmart proceed with Fintiv.

C. Fintiv Designs And Develops Walmart's First Mobile Wallet

30. Fintiv presented a global wireless vision, the origin of MoTEAF™, to Walmart in or about 2001.

31. In 2002, Fintiv hosted a meeting with senior Walmart executives at Walmart's headquarters in Bentonville, Arkansas, to discuss a possible mobile virtual network provider ("MVNO") within Walmart. Attendees at this meeting included Doug McMillon (at the time, General Manager in Home Entertainment at Walmart; currently serving as President and Chief Executive Officer at Walmart), Allen Henri (at the time, Manager of Prepaid and Postpaid Wireless Business at Walmart; currently serving as the Senior Director of Mobile Services and Field Operations at Walmart) along with representatives from NTT DoCoMo, Inc. ("NTT"), a large mobile provider at the time.

32. At this meeting, Doug McMillon stated that "everything we know in mobile is because of [Fintiv]."

33. In 2008, pursuant to authorization from John Fleming (at the time, EVP Chief Merchandising Officer at Walmart), Fintiv created a mobile wallet for Walmart ("MWallet") with a plan to launch after a thorough scoping.

34. Fintiv created and delivered to Walmart the MWallet proprietary business model and product offering.

35. Subsequently, intense scoping by Walmart of MWallet commenced, and Scott Sandlin (at the time, Executive – Head of Financing, Protection, and Home Services at Walmart) was appointed as the point person for Walmart Multi-Channel Committee and Walmart Financial Services.

36. In 2009, Fintiv held a follow-up meeting with Telefonica in Bentonville, Arkansas, which was attended by Jane Thompson (at the time, President at Walmart Financial Services), Scott Sandlin, Aaron Kribs (at the time, Senior Manager Health & Wellness – Multi-Channel Innovation & Strategy at Walmart), Mike Cook (Vice President & Assistant Treasurer at Walmart), Daniel Eckert (at the time, Vice President of Financial Services at Walmart; currently serving as Senior Vice President of Walmart Services and Digital Acceleration at Walmart), and Mike Zeher, Jr. (Senior Director of Treasury Operations at Walmart) among numerous other Walmart executives.

37. During the presentation, Mike Cook raised his hand to ask "what is a mobile wallet?"

38. Mike Cook would go on to be named "The Most Powerful Man in Payments" by MIT Technology Review less than three years later.

https://www.technologyreview.com/s/427358/the-most-powerful-man-in-payments/

39. On or about July 30, 2009, after the Telefonica meeting in Bentonville, Jane Thompson and Fintiv held a meeting to review and prepare for the Walmart MWallet product offering and launch.

40. Fintiv engaged in detailed scoping sessions with Walmart and plans were made for the launch of MWallet. At least two meetings between Fintiv and Walmart took place in Dallas, in or about August 2010 and September 2010, at which Fintiv's trade secrets were discussed in detail.

41. On or about August 17, 2012, Fintiv gave Walmart a comprehensive presentation in Arkansas about its proprietary MoTEAF™ technology platform integrating a full suite of functionalities in mobile payment, shopping, marketing, and transaction-based analytics. This comprehensive presentation set forth a detailed overview of MoTEAF™, how it could be implemented within Walmart, and the benefits Walmart would reap once implemented. This presentation included Fintiv's confidential and proprietary information protected by trade secret.

42. In or about September 2012, Walmart executives Jamie Henry and Mike Cook directed Fintiv to continue discussions with MCX in Dallas, Accordingly, Fintiv gave Walmart/MCX a comprehensive technology presentation in Dallas in September 2012, further detailing how to implement MoTEAF™. Four individuals attended the meeting from Walmart/MCX, including Dodd Roberts, who on information and belief reported to Walmart executive Mike Cook at the time. This presentation and the related discussion included Fintiv's trade secrets and confidential information. Fintiv is informed and believes and thereupon alleges

that MCX participated in this meeting in its capacity as Walmart's agent, and conveyed the trade secret and confidential information presented at this meeting to Walmart, for Walmart's use.

43. At the end of 2013, Walmart again directed Fintiv to talk to MCX in Dallas. Discussions with Walmart/MCX continued through February 2014, when Walmart announced it would partner with Paydiant instead of Fintiv.

D. Walmart Misappropriates Fintiv's Trade Secrets And Confidential Information

44. Walmart pretended to partner with Fintiv in launching MWallet, drained Fintiv of its trade secrets, and ultimately backed out of its partnership with Fintiv and launched Walmart Pay using stolen trade secrets.

45. By July 6, 2016, Walmart Pay was available in the more than 4,600 Walmart stores nationwide, and 88% of Walmart Pay transactions came from repeat Walmart Pay customers. https://news.walmart.com/2016/07/06/walmart-pay-now-available-in-all-walmart-stores-nationwide.

46. Prior to Fintiv, Walmart had no knowledge or information regarding mobile wallets.

47. Walmart created Walmart Pay using Fintiv's trade secrets, confidential information, and know-how, which it obtained directly and through its agent MCX.

48. Following the release of Walmart Pay, Fintiv learned that Walmart Pay includes Fintiv's trade secrets, confidential information, and know-how.

49. Walmart earns millions of dollars from mobile payments, including Walmart Pay.

50. Fintiv never authorized or consented to Walmart and/or MCX's acquisition by improper means, disclosure, or use of its trade secrets.

51. Walmart did not compensate Fintiv for use of Fintiv's trade secrets and/or confidential information.

52. Walmart's misappropriation of Fintiv's trade secrets, directly and through its agent MCX, has injured Fintiv, has caused financial damage and irreparable harm to Fintiv.

CAUSE OF ACTION:
Misappropriation of Trade Secrets Common Law / TUTSA

53. Fintiv re-alleges and incorporates by reference the allegations of the preceding paragraphs of this Original Petition as if fully set forth herein.

54. The trade secrets owned by Fintiv and improperly acquired by Walmart, directly and through its agent MCX, include information and know-how related to the implementation and maintenance of mobile financial services.

55. Fintiv's trade secrets were not public. Fintiv's trade secrets relate to products and services used, sold, shipped and/or ordered, or intended to be used, sold, shipped and/or ordered, in interstate or foreign commerce.

56. Fintiv takes reasonable measures to maintain their secrecy by, among other things, requiring employees to sign confidentiality and non-disclosure agreements, by restricting access to its trade secrets, and by requiring a password login to access its trade secrets.

57. Fintiv's trade secrets derive independent economic value from not being generally known to, and not readily ascertainable through proper means by, another person or entity who could obtain economic value from the disclosure or use of the information.

58. Walmart improperly acquired Fintiv's trade secrets, directly and through its agent MCX, under the pretense of launching a business venture.

59. Walmart improperly used Fintiv's trade secrets, directly and through its agent MCX, in its technical and business models, including, without limitation, the development and launch of Walmart Pay.

60. Walmart's misappropriation of Fintiv's confidential, proprietary, and trade secret information was intentional, knowing, willful, malicious, fraudulent, and oppressive.

61. Walmart knew when it acquired, disclosed, and used Fintiv's trade secrets that it had acquired those secrets by improper means.

62. Fintiv never authorized or consented to Walmart and/or Walmart/MCX's acquisition by improper means, disclosure, or use of its trade secrets.

63. Walmart has acquired, disclosed, and used the misappropriated trade secrets to unjustly gain market share and commercial advantage.

64. Walmart's misappropriation of Fintiv's trade secrets has injured Fintiv, has caused financial damage to Fintiv, and will continue to injure and cause financial damage to Fintiv unless enjoined by this Court. Fintiv, therefore, is entitled to injunctive relief against and to recover damages from Walmart for violation of the Texas Uniform Trade Secrets Act, Tex. Civ. Prac. & Rem. Code § 134A.001 et seq., and for breach of the common law.

65. In addition, Fintiv also seeks exemplary damages for Walmart's willful and malicious misappropriation of Fintiv's trade secrets, under Tex. Civ. Prac. & Rem. Code § 134A.004.

JURY DEMAND

66. Fintiv demands a jury trial and tenders the appropriate fee with the filing of this petition.

PRAYER FOR RELIEF

67. For these reasons, Plaintiff, Fintiv, Inc., requests that Defendant, Walmart Inc., be cited to appear and answer, and that on final trial Plaintiff have judgment for its actual and exemplary damages; injunctive relief; prejudgment and post judgment interest and costs of court; and such other and further relief, general or special, whether at law or in equity, to which it may show itself justly entitled.

DATED: July 22, 2020

Respectfully submitted,

/s/ Jeffrey M. Tillotson

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Counsel for Plaintiff Fintiv, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served on all counsel of record herein on July 22, 2020 by E-Service.

/s/ Jeffrey M. Tillotson
Jeffrey M. Tillotson

Appendix E

Pinto Tech. Ventures, L.P. v. Sheldon, 526 S.W.3d 428 (Tex. 2017)

526 S.W.3d 428
Supreme Court of Texas.

PINTO TECHNOLOGY VENTURES, L.P.; Pinto TV Annex Fund, L.P.; PTV Sciences II, L.P.; Rivervest Venture Fund I, L.P.; Rivervest Venture Fund II, L.P.; Rivervest Venture II (Ohio), L.P.; Bay City Capital Fund IV, L.P.; Bay City Capital Fund IV Co-Investment Fund, L.P.; Chris Owens; Bill Burke; Reese Terry; and Craig Walker, Petitioners,
v.
Jeffery SHELDON and Andras Konya, M.D., Ph.D., Respondents

No. 16-0007
|
Argued February 28, 2017
|
OPINION DELIVERED: May 19, 2017
|
Rehearing Overruled September 22, 2017

Synopsis

Background: Minority shareholders brought action against corporation's venture-capital majority shareholders, two of corporation's officers, and two of corporation's directors, alleging fraud, breach of fiduciary duty, minority shareholder oppression, state securities law violations, and conspiracy as to various parties. The 125th District Court, Harris County, No. 2013–41145, Kyler Carter, J., granted defendants' motion to dismiss. Minority shareholders appealed. The Houston Court of Appeals, 14th District, Kem Thompson Frost, C.J., 477 S.W.3d 411, reversed and remanded. Defendants appealed.

Holdings: The Supreme Court, Guzman, J., held that:

[1] minority shareholders' claims evidenced a "dispute arising out of" shareholders agreement, and thus fell within the scope of agreement's Delaware forum-selection clause;

[2] minority shareholder bound himself to shareholders agreement's Delaware forum-selection clause by signing earlier version of shareholders agreement, which allowed non-unanimous amendment of the agreement;

[3] even if transaction participant could enforce forum-selection clause, corporation's chief executive officer (CEO) and chief finance officer (CFO), as nonsignatories, could not rely on transaction-participant doctrine to enforce shareholders agreement's forum-selection clause against minority shareholders; and

[4] civil practice and remedies code provisions governing mandatory venue for major transactions and multiple claims did not permit corporation's CEO and CFO, as nonsignatories, to enforce shareholders agreement's forum-selection clause against minority shareholders.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (20)

[1] **Contracts** Agreement as to place of bringing suit; forum selection clauses

Subject to public-policy constraints, forum-selection clauses are generally enforceable.

2 Cases that cite this headnote

[2] **Contracts** Agreement as to place of bringing suit; forum selection clauses

Contracts Language of contract

Contracts Legal remedies and proceedings

In determining the enforceability of a forum-selection clause and the extent to which nonsignatories may resist or enforce such clauses, common principles of contract and agency law and the parties' chosen language are the fulcrum of the courts' inquiry because forum-selection clauses are creatures of contract and courts must give effect to the parties' intent as expressed in the four corners of the document.

5 Cases that cite this headnote

[3] **Contracts** Legal remedies and proceedings

While the party who brings a suit is master to decide what law he will rely on, whether a forum-selection clause applies depends on the factual

allegations undergirding the party's claims rather than the legal causes of action asserted.

2 Cases that cite this headnote

[4] **Contracts** Agreement as to place of bringing suit; forum selection clauses

Forum-selection clauses provide parties with an opportunity to contractually preselect the jurisdiction for dispute resolution.

8 Cases that cite this headnote

[5] **Contracts** Agreement as to place of bringing suit; forum selection clauses

Forum-selection clauses are generally enforceable and should be given full effect.

2 Cases that cite this headnote

[6] **Contracts** Legal remedies and proceedings

Failing to give effect to contractual forum-selection clauses and forcing a party to litigate in a forum other than the contractually chosen one amounts to clear harassment injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics.

3 Cases that cite this headnote

[7] **Contracts** Legal remedies and proceedings

Courts Decisions of United States Courts as Authority in State Courts

In considering who may enforce a forum-selection clause, who is bound by it, and whether claims fall within the scope of the clause, the Supreme Court may seek guidance from federal law analyzing forum-selection clauses and draw analogies between forum-selection clauses and arbitration clauses, which are a specialized kind of forum-selection clause.

26 Cases that cite this headnote

[8] **Contracts** Legal remedies and proceedings

Legal theories and causes of action are not controlling when determining whether claims falls within the scope of a forum-selection clause; rather, courts avoid slavish adherence to a contract/tort distinction because doing otherwise would allow a litigant to avoid a forum-selection clause with artful pleading.

6 Cases that cite this headnote

[9] **Contracts** Legal remedies and proceedings

When a forum-selection clause encompasses all disputes arising out of an agreement, instead of claims, its scope is necessarily broader than claims based solely on rights originating exclusively from the agreement.

9 Cases that cite this headnote

[10] **Contracts** Legal remedies and proceedings

In cases where a plaintiff characterizes its claim as a statutory or common-law tort claim to evade the agreed-upon forum despite essential allegations that are inextricably enmeshed or factually intertwined with the underlying contract, the forum-selection clause should be denied force only if the facts alleged in support of the claim stand alone, are completely independent of the contract, and the claim could be maintained without reference to the contract.

2 Cases that cite this headnote

[11] **Contracts** Legal remedies and proceedings

Minority shareholders' claims against majority shareholders, officers, and directors for fraud, breach of fiduciary duty, minority shareholder oppression, and state securities law violations evidenced a "dispute arising out of" shareholders agreement, and thus fell within the scope of agreement's Delaware forum-selection clause; many of minority shareholders' statutory and common-law tort claims involved same operative facts that would be implicated in parallel breach of contract claim, "but for" the agreement, no dispute about loss of preemptive rights would exist and dilution of equity would not have occurred, and allegations invoked

the shareholders agreement as integral part of shareholders' claimed injuries.

3 Cases that cite this headnote

[12] **Contracts** Agreement as to place of bringing suit; forum selection clauses

Contracts Legal remedies and proceedings

Contracts Operation and effect

Minority shareholder bound himself to shareholders agreement's Delaware forum-selection clause by signing earlier version of shareholders agreement, which allowed non-unanimous amendment of the agreement, and thus was required to bring claims for fraud, breach of fiduciary duty, and minority shareholder oppression against majority shareholders in Delaware; although earlier version of agreement designated Texas forum, forum-selection clause was amended following protocol set forth in the agreement, and effectiveness provision, stating that agreement would become effective when executed by shareholder, only applied to shareholders who had not signed the earlier agreement.

3 Cases that cite this headnote

[13] **Contracts** Construction as a whole

Courts interpret contracts to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.

2 Cases that cite this headnote

[14] **Contracts** Legal remedies and proceedings

As a general proposition, a forum-selection clause may be enforced only by and against a party to the agreement containing the clause; because forum-selection clauses are creatures of contract, the circumstances in which nonsignatories can be bound to a forum-selection clause are rare.

35 Cases that cite this headnote

[15] **Contracts** Legal remedies and proceedings

Under the transaction-participant theory which allows a transaction participant to enforce a valid forum-selection clause even if he or she was not an actual signatory to the contract, a "transaction participant" includes an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause.

9 Cases that cite this headnote

[16] **Contracts** Legal remedies and proceedings

Even if transaction participant could enforce forum-selection clause, corporation's chief executive officer (CEO) and chief finance officer (CFO), as nonsignatories, could not rely on transaction-participant doctrine to enforce shareholders agreement's Delaware forum-selection clause against minority shareholders, as signatories, in minority shareholders' action for fraud, breach of fiduciary duty, and minority shareholder oppression; agreement's forum-selection clause expressly disclaimed any intent to extend contract's benefits to nonparties and precluded application of the doctrine, and enforcement of the clause would not have been reasonably foreseeable, as transaction-participant theory contemplated.

2 Cases that cite this headnote

[17] **Alternative Dispute Resolution** Persons affected or bound

The question of who is actually bound to dispute resolution in the contractually specified forum is ultimately a function of the intent of the parties as expressed in the terms of the arbitration agreement.

2 Cases that cite this headnote

[18] **Contracts** Rights Acquired by Third Persons

Contract language can extend enforcement rights to nonsignatories.

1 Cases that cite this headnote

[19] **Contracts** Legal remedies and proceedings

Under the "substantially interdependent and concerted misconduct doctrine," nonsignatories may enforce a forum-selection clause when a signatory to the contract containing the forum selection clause raises allegations of substantially interdependent and concerted misconduct by both non-signatories and one or more signatories to the contract.

12 Cases that cite this headnote

[20] **Contracts** Legal remedies and proceedings

Civil practice and remedies code provisions governing mandatory venue for major transactions and multiple claims did not permit corporation's chief executive officer (CEO) and chief finance officer (CFO), as nonsignatories, to enforce shareholders agreement's Delaware forum-selection clause against minority shareholders, as signatories, in minority shareholders' action for fraud, breach of fiduciary duty, and minority shareholder oppression; written financing agreement did not involve consideration above major transaction provision's monetary threshold, shareholders agreement was separate from financing agreement, and parties never agreed on particular forum for action arising from financing transaction. Tex. Civ. Prac. & Rem. Code Ann. §§ 15.004, 15.020(a), 15.020(c).

2 Cases that cite this headnote

***431** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS, Kem Thompson Frost, J.

Attorneys and Law Firms

***432** B. Russell Horton, R. James George Jr., George Brothers Kincaid & Horton LLP, Austin, Daniel David, Amy Pharr Hefley, David D. Sterling, J. Mark Little, Baker Botts, LLP, Houston, Thomas R. Phillips, Baker Botts L.L.P., Austin, for Petitioners.

Jeff Joyce, Huma Ali, Joyce + McFarland LLP, Houston, Craig T. Enoch, Melissa A. Lorber, Enoch Kever PLLC, Austin, for Respondents.

Opinion

Justice Guzman delivered the opinion of the Court.

[1] **[2]** Subject to public-policy constraints, forum-selection clauses are generally enforceable in Texas.[1] Though enforceability is not the concern it once was,[2] courts are frequently confronted with disagreements about the specific claims encompassed and the extent to which nonsignatories may resist or enforce such clauses. In determining these matters, common principles of contract and agency law[3] and the parties' chosen language are the fulcrum of our inquiry because forum-selection clauses are creatures of contract and we must give effect to the parties' intent as expressed in the four corners of the document.[4]

1 *See In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231-32 (Tex. 2008) (orig. proceeding) (enforcement of a forum-selection clause is required unless the clause is "invalid for reasons of fraud or overreaching" or enforcement would contravene "a strong public policy of the forum where the suit was brought," is "unreasonable or unjust," or would result in serious inconvenience (citing *In re AIU Ins. Co.*, 148 S.W.3d 109, 112 (Tex. 2004) (orig. proceeding))); *see also In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding) (holding that "a forum-selection clause may be waived, and it would ordinarily be 'unreasonable or unjust' for a court to enforce a forum-selection clause" that has been waived).

2 *See In re AIU Ins. Co.*, 148 S.W.3d at 111 (observing that, "[a]t one time, forum-selection clauses were disfavored by American courts because such clauses were viewed as 'ousting' a court of jurisdiction").

3 *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (orig. proceeding) (identifying six theories that may bind nonsignatories to an arbitration agreement—incorporation by reference, assumption, agency,

alter ego, equitable estoppel, and third-party beneficiaries).

4 *Cf. G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 520 n.15 (Tex. 2015) (orig. proceeding) ("In deciding ... questions of arbitrability, courts apply the common principles of general contract law to determine the parties' intent."); *In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011) (whether an arbitration agreement can be enforced by or against a nonsignatory depends on the parties' intent as expressed in the agreement).

Here, certain minority shareholders filed suit alleging dilution of equity interests and the defendants responded, in part, by invoking a forum-selection clause designating Delaware as the proper forum for "any dispute arising out of" a shareholders agreement. The parties ask us to decide (1) which parties are bound to the forum-selection clause as signatories or nonsignatories to the shareholders agreement and (2) whether statutory and common-law tort claims that are factually predicated on the existence or terms of that agreement must be litigated in the contractually designated forum. The trial court granted the defendants' motion to dismiss, but a divided court of appeals reversed, holding the forum-selection clause does not control because the shareholders' extracontractual claims do not allege noncompliance or interference with any rights or obligations derived from the shareholders agreement. [5]

5 477 S.W.3d 411, 417-20 (Tex. App.—Houston [14th Dist.] 2015) (noting the shareholders did not assert any claims for breach of the shareholders agreement and that all asserted claims are noncontractual and are premised on general obligations imposed by law rather than the parties' agreement).

***433** **[3]** While "the party who brings a suit is master to decide what law he will rely on," [6] whether a forum-selection clause applies depends on the factual allegations undergirding the party's claims rather than the legal causes of action asserted. [7] Focusing on the factual allegations in this case rather than the legal theories the minority shareholders elected to pursue, we hold that the shareholders' statutory and common-law tort claims evidence a "dispute arising out of" the shareholders agreement because (1) the existence or terms of the agreement are operative facts in the litigation and (2) "but for" that agreement the shareholders would not be aggrieved. [8] Our holding today is faithful to the parties' chosen contractual language, avoids "slavish adherence to a contract/tort distinction," [9] and prevents litigants from avoiding a forum-selection clause with "artful pleading." [10] We further hold the shareholders are bound by the forum-selection clause as signatories to the shareholders agreement, except with respect to their claims against the nonsignatory defendants. We therefore reverse the court of appeals' judgment, render judgment dismissing the minority shareholders' claims in part, and remand the case to the trial court for further proceedings in part.

6 *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716 (1913) (law asserted as basis for recovery determines, for jurisdictional purposes, whether the claims arise under federal law).

7 *Cf. In re Rubiola*, 334 S.W.3d at 225.

8 *See Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993) (applying a "same operative facts" test to noncontractual claims); *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 886 (Tex. 2010) (orig. proceeding) ("but for" the agreement containing the forum-selection clause, the plaintiff would have no basis for the complaints made in the lawsuit).

9 *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677 (Tex. 2009) (orig. proceeding) (quoting *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 444 (5th Cir. 2008)).

10 *Id.* (quoting *Ginter*, 536 F.3d at 444).

I. Factual and Procedural Background

Jeffery Sheldon and Andras Konya are shareholders in IDev Technologies, Inc. (IDEV), a developer and manufacturer of medical devices. Sheldon founded IDEV in 1999 and served as its Chief Executive Officer (CEO) until 2008. Konya, an IDEV consultant from 2002 to 2012, is the co-inventor of vascular-stent technology IDEV licensed in 2000. Both Sheldon and Konya initially acquired IDEV common stock through their business relationship with the company. Sheldon later added to his IDEV holdings by purchasing preferred stock.

IDEV engaged in multiple rounds of financing, causing Sheldon's and Konya's proportional ownership interests to change over time. In early 2010, shortly before the events giving rise to the present dispute, Sheldon and Konya allege they owned 5% and 2.4% of IDEV's total outstanding shares, respectively. Following a series of transactions in 2010, however, Sheldon and Konya allege their interests were substantially and wrongfully diluted to a fraction of 1% in a concerted effort by certain controlling parties to wipe out common stockholders after first converting preferred stock to common stock. Sheldon and Konya contend the 2010 transactions manipulated, diluted, and devalued their holdings, depriving them of a significant payout in connection with IDEV's impending acquisition by another company at a considerable sum.

Sheldon and Konya (collectively, the Shareholders) sued IDEV's venture-capital ***434** majority shareholders,[11] IDEV's CEO Chris Owens and Chief Financial Officer (CFO) Bill Burke, and IDEV directors Reese Terry and Craig Walker (collectively, the IDEV parties), alleging fraud, breach of fiduciary duty, minority-shareholder oppression, Texas Blue Sky Law violations, and conspiracy as to various parties. The IDEV parties moved to dismiss the claims based on a forum-selection clause in IDEV's 2010 Amended and Restated Shareholders Agreement (2010 Amended Shareholders Agreement), which plays a featured role in the allegations underlying the Shareholders' statutory and common-law tort claims. Sheldon and Konya contest the forum-selection clause's applicability to the dispute for a variety of reasons relating to the circumstances giving rise to the underlying dispute and amendment of the clause to change venue from Texas to Delaware.

11 Pinto Technology Ventures, L.P.; Pinto TV Annex Fund, L.P.; PTV Sciences II, L.P.; RiverVest Venture Fund I, L.P.; RiverVest Venture Fund II, L.P.; RiverVest Venture Fund II (Ohio), L.P.; Bay City Capital Fund IV, L.P.; and Bay City Capital Fund IV Co-Investment Fund, L.P. By 2010, the venture-capital funds collectively controlled over 60% of the IDEV issued and outstanding stock.

A forum-selection clause has long been part of IDEV's shareholder agreements, as amended in 2002, 2004, 2006, 2008, and 2010. Both the 2002 and 2004 agreements included a forum-selection clause designating Harris County, Texas, as the forum for "any dispute arising out of" those agreements, but following an amendment in 2006, the shareholders agreement was revised to require litigation of disputes in Delaware:

> [T]he Delaware state courts of Wilmington, Delaware (or, if there is exclusive federal jurisdiction, the United States District Court for the District of Delaware) shall have exclusive jurisdiction and venue over any dispute arising out of this Agreement, and the parties hereby consent to the jurisdiction of such courts.

The 2008 and 2010 agreements carried forward the Delaware forum-selection clause without alteration.

Sheldon signed all of the shareholder agreements, except the 2010 Amended Shareholders Agreement. Konya signed only the 2002 and 2004 shareholder agreements, but, notably, the 2004 agreement authorized written amendments with the assent of IDEV and a majority of the stockholders. Subsequent versions of the shareholders agreement also had provisions allowing for amendment on similar terms.

The stated purpose of each amended shareholders agreement was to "promote the best interests" of IDEV and the "mutual interests" of the company and its shareholders by "imposing certain requirements with respect to the voting and transferability of the shares of [the company's stock] owned by the Shareholders." To that end, under the shareholders agreement, as amended from time to time, the shareholders and IDEV have certain rights and obligations that govern the relationship between them.

Several of the amendments to the shareholders agreement coincided with financing required for IDEV's growth and solvency. Series A Financing in 2004 raised approximately $1.8 million; Series B in 2006 raised $24 million; and Series C in 2008 raised an additional $25 million. These transactions diluted the Shareholders' interests over time without any apparent dispute. However, dilution related to Series B-1 financing in 2010 and interconnected actions to amend the shareholders agreement precipitated Sheldon's and ***435** Konya's claims in the instant lawsuit. In addition to complaining about sundry actions permitted under the 2010 Amended Shareholders Agreement, the Shareholders allege:

- In 2010, the "Defendants set out to reduce [the Shareholders'] holdings ... to a modest fraction of 1% and to similarly dilute other existing shareholders" employing "the following steps to accomplish their goal," among others:

  1. "The venture capital defendants ... caused the board of directors to join with them to amend the Shareholder's Agreement, eliminating Sheldon['s] ... preemptive rights"; and

  2. "[The independent directors] Terry and Walker ... went along with the various steps—including the amendment of the Shareholder Agreement—in breach of their fiduciary duties."

- "The Defendants caused the Shareholder Agreement to be amended in hopes of avoiding Sheldon's (and others') preemptive rights in respect of his common and preferred stock holdings."

- "[T]he 2010 Shareholder Agreement amendment was procured by fraud and breaches of fiduciary duty."

- "Defendants failed to disclose material facts to Sheldon related to the 2010 Shareholder Agreement amendment and related transactions."

- "Defendants may claim no rights under the 2010 Shareholder Agreement amendment as it is unenforceable under [the Blue Sky Law]."

After considering the pleadings on file and the parties' arguments, the trial court granted the motion to dismiss in favor of a Delaware forum and dismissed the lawsuit with prejudice to refiling in Texas.

In a split decision, the court of appeals reversed, holding the forum-selection clause inapplicable to this dispute because an "arising out of" forum-selection clause applies only when the claims would not exist "but for" the agreement containing the clause. [12] The court determined that the rights and obligations underlying the Shareholders' claims derive from statute and common law and, thus, do not "aris[e] out of" the 2010 Amended Shareholders Agreement. [13] Given its holding on the latter question, the court did not consider the Shareholders' additional arguments that, as nonsignatories, CEO Owens and CFO Burke lack enforcement capacity and that Konya is required to litigate only in Harris County, not Delaware.

12 477 S.W.3d 411, 418, 421 (Tex. App.—Houston [14th Dist.] 2015) (citing *In re Lisa Laser*, 310 S.W.3d at 886).

13 *Id.* at 418, 421 (finding lack of a "but for" relationship between the obligations and rights sued on and the relationship created by the shareholders agreement).

The dissenting justice assailed the majority's analysis as improperly "consider[ing] just the labels of the claims" instead of "focus[ing] on the substance of the claims." [14] And, more pointedly, the dissent took issue with the majority's application of an unduly conscribed causal-nexus standard that belies a "common-sense examination" of the claims' substance; permits artful pleading; and constrains "arising out of" language to only those disputes brought as breach-of-contract and tortious-interference claims. [15] Rejecting the majority's conclusion, the dissent found the forum-selection ***436** clause controlling because (1) the Shareholders' claims substantively pertain to dilution of Sheldon's and Konya's equity interests; (2) the shareholders agreement was amended "to enable that dilution and to protect the investors who acquired the newly issued stock"; and (3) the factual allegations relating to the dilution are "inextricably enmeshed" and "factually intertwined" with the agreement, surpassing the low "but for" connective threshold. [16]

14 *Id.* at 421 (CHRISTOPHER, J., dissenting) (citing *In re Fisher*, 433 S.W.3d 523, 529 (Tex. 2014) (orig. proceeding)).

15 *Id.*

16 *Id.* at 421-24.

After an evenly divided en banc panel denied reconsideration, the IDEV parties appealed to this Court, arguing (1) the court of appeals applied an overly restrictive scope-of-coverage standard that necessarily excludes all statutory and common-law tort claims, which are always derived from extra-contractual rights and obligations; (2) a "common-sense examination" of the Shareholders' substantive allegations reveals this "dispute aris[es] out of" the 2010 Amended Shareholders Agreement; (3) Konya is contractually bound to subsequent contract amendments designating Delaware as the exclusive dispute-resolution forum; and (4) CEO Owens and CFO Burke can enforce the forum-selection clause as nonsignatories under the transaction-participant theory, [17] the substantially interdependent and concerted misconduct

doctrine,[18] and the mandatory-venue provisions in Texas Civil Practice and Remedies Code sections 15.004 and 15.020.[19]

17 *See, e.g.*, *Carlile Bancshares, Inc. v. Armstrong*, Nos. 02-14-00014-CV, 02-14-00018-CV, 2014 WL 3891658, at *10 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.) ("Nonsignatories may be subject to forum-selection clauses if they were transaction participants.").

18 *Deep Water Slender Wells, Ltd. v. Shell Int'l Expl. & Prod., Inc.*, 234 S.W.3d 679, 694 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) ("Courts should apply equitable estoppel when a signatory to the contract containing the forum-selection clause raises allegations of substantially interdependent and concerted misconduct by both nonsignatories and one or more signatories to the contract.").

19 *See* TEX. CIV. PRAC. & REM. CODE §§ 15.004 (if one claim is governed by a mandatory-venue provision, all joined claims shall be brought in the county required by that provision), .020 (a party may not bring an action arising from a major transaction in a county if the party "agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction").

In addition to echoing the court of appeals' analysis regarding the scope of the Delaware forum-selection clause, the Shareholders refute both its application as to Konya, because he only signed shareholder agreements designating a Texas forum, and its enforcement by Owens and Burke as nonsignatories under any of the asserted theories.

II. Discussion

A. Standard of Review

[4] **[5]** **[6]** Forum-selection clauses provide parties with an opportunity to contractually preselect the jurisdiction for dispute resolution.[20] In Texas, forum-selection clauses are generally enforceable[21] and "should be given full effect."[22] Failing to give effect to contractual forum-selection clauses and forcing a party to litigate in a forum other than the contractually chosen one amounts to " 'clear harassment' ... ***437** injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics...."[23]

20 *See, e.g.*, *In re AIU Ins. Co.*, 148 S.W.3d 109, 111 (Tex. 2004) (orig. proceeding).

21 *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding).

22 *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (orig. proceeding).

23 *Id.* (quoting *In re AutoNation, Inc.*, 228 S.W.3d 663, 667-68 (Tex. 2007) (orig. proceeding)).

[7] Here, the parties agree the forum-selection clause is generally enforceable, but disagree about who may enforce it, who is bound by it, and whether the statutory and common-law tort claims alleged in this lawsuit constitute a "dispute arising out of" the 2010 Amended Shareholders Agreement. In considering these matters, we may seek guidance from federal law analyzing forum-selection clauses and draw analogies between forum-selection clauses and arbitration clauses,[24] which are "a specialized kind of forum-selection clause."[25]

24 *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677 (Tex. 2009) (orig. proceeding).

25 *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

We begin our analysis by considering the scope of the forum-selection clause.

B. The Claims Fall within the Scope of the Forum-Selection Clause

[8] Whether Sheldon and Konya's noncontractual claims fall within the forum-selection clause's scope depends on the parties' intent as expressed in their agreement and a "common-sense examination" of the substantive factual allegations.[26] Legal theories and causes of action are not controlling.[27] Rather, we avoid "slavish adherence to a contract/tort distinction,"[28] because doing otherwise "would

allow a litigant to avoid a forum-selection clause with 'artful pleading.' " [29]

26 *In re Int'l Profit Assocs.*, 274 S.W.3d at 677.

27 *Cf. In re Rubiola*, 334 S.W.3d 220, 225 (Tex. 2011) (orig. proceeding) (courts are required to " 'focus on the factual allegations of the complaint, rather than the legal causes of action asserted' " (quoting *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995))).

28 *In re Int'l Profit Assocs.*, 274 S.W.3d at 677 (quoting *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 444 (5th Cir. 2008)).

29 *Id.* (quoting *Ginter*, 536 F.3d at 444).

The starting point of the inquiry is the forum-selection clause's language. [30] In this case, the parties agreed to resolve "any dispute arising out of this Agreement" in Delaware. Dictionaries define "arise" to mean "to originate from a specified source," [31] "to stem (from)," [32] and "[t]o result (from)." [33] This Court has observed that the words "arising out of" have "broad[ ] significance," [34] and we discern no significant limitation on their breadth from the language employed in the shareholders agreement.

30 *See Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 Fed.Appx. 612, 616 (5th Cir. 2007) ("[W]e look to the language of the parties' contracts to determine which causes of action are governed by the forum selection clause." (quoting *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 222 (5th Cir. 1998) (internal quotations omitted))).

31 *Arise*, WEBSTER'S THIRD NEW INT'L DICTIONARY (2002).

32 *Arise*, BLACK'S LAW DICTIONARY (10th ed. 2014).

33 *Id.*

34 *In re NEXT Fin. Grp.*, 271 S.W.3d 263, 268 (Tex. 2008) (orig. proceeding) (an arbitration case quoting *Utica National Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004), an insurance case).

In the insurance context, we have described similar language as connoting "a ***438** causal connection or relation," [35] concluding but-for causation is sufficient, even without direct or proximate causation. [36] A "but for" cause is one "without which the event could not have occurred." [37] In describing the temporal reach of but-for causation, we have repeatedly observed it "has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." [38]

35 *Utica*, 141 S.W.3d at 203.

36 *Id.*

37 *But-For Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007) (defining "but for" cause as "one without which the event would not have occurred").

38 *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 308 (Tex. 2015) (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 581 (Tex. 2007)).

Bearing these standards in mind, we previously applied the but-for causal standard to a forum-selection clause applicable to "any dispute arising out of" a distribution agreement in *In re Lisa Laser USA, Inc.*, and concluded that a party's "claims arise out of the Agreement" when "but for the Agreement, [the party] would have no basis to complain." [39]

39 310 S.W.3d 880, 886 (Tex. 2010) (orig. proceeding).

Examining federal law for further guidance, we note that federal courts take a wide variety of approaches in interpreting "arising out of" or "arising under" forum-selection clauses, especially when determining whether such a clause extends to noncontractual claims.

The Seventh Circuit, for example, has been openly critical of the but-for test:

> But-for causation is an unsatisfactory understanding of language referring to "disputes arising out of" an agreement. Let us suppose that while inspecting Omron's facilities, a manager of Maclaren stepped on a baby rattle and fell. Would the ensuing tort litigation go to the High Court of Justice in the United Kingdom just because, but for the distribution agreement, none of Maclaren's employees would have been on Omron's premises? "Arising out of" and "arising under" are familiar phrases, and courts have resisted the siren call of collapsing them to but-for causation. An example: but for the existence of federal drug safety standards, it would not be possible to contend that noncompliance with the standards is tortious, but it does not follow that a tort suit "arises under" those standards and thus activates federal jurisdiction. [40]

Faced with a forum-selection clause similar to the one in *Lisa Laser*, the Seventh Circuit ultimately concluded that "all disputes the resolution of which arguably depend on the construction of an agreement 'arise out of' that agreement." [41]

40 *Omron Healthcare, Inc. v. Maclaren Exps. Ltd.*, 28 F.3d 600, 602 (7th Cir. 1994).

41 *Id.* at 603.

The First Circuit has applied a "same operative facts" test, holding that "contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties." [42] Federal courts in different jurisdictions, including Texas federal courts, have also found satisfaction of this test sufficient to invoke a contractual forum-selection ***439** clause. [43]

42 *Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993).

43 *Morgan–Rinehart v. Van de Perre*, A-16-CA-01327-SS, 2017 WL 1383933, at *8 (W.D. Tex. Apr. 12, 2017) (noting that "[a]lthough the Fifth Circuit has not articulated a specific test for determining when claims fall within the scope of a forum selection clause, district courts within this circuit usually look to three rules [including] whether the claims 'involv[e] the same operative facts as a parallel claim for breach of contract' " (quoting *AlliantGroup, L.P. v. Mols*, CV H-16-3114, 2017 WL 432810, at *7 (S.D. Tex. Jan. 30, 2017))); *see also Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 695 (8th Cir. 1997) ("The First Circuit's approach is more revealing in this case.... Although we recognize that Terra's claims are alleged as tort claims, Terra plainly could have asserted a parallel claim for breach of contract in the same complaint."); *Forrest v. Verizon Comm'cs, Inc.*, 805 A.2d 1007, 1014 (D.C. 2002) ("We follow the number of courts that have held that non-contract claims that involve the same operative facts as a parallel breach of contract claim fall within the scope of a forum selection clause.").

Noting the absence of a specifically articulated test under Fifth Circuit jurisprudence, one federal district court recently opined that courts within that circuit generally consider (1) "whether the tort claims 'ultimately depend on the existence of a contractual relationship between the parties,' " (2) "whether 'resolution of the claims relates to interpretation of the contract,' " and (3) "whether the claims 'involv[e] the same operative facts as a parallel claim for breach of contract.' " [44]

44 *Morgan–Rinehart*, 2017 WL 1383933, at *8 (examining a forum-selection clause applying to "any legal action arising out of" a settlement agreement).

The court of appeals in this case took a much narrower approach, concluding a dispute arises out of a contract only when claims are based on the rights and duties established in the contract, regardless of whether the operative facts of the dispute involve the validity, terms, or performance of the agreement or have a substantial connection to it. When applied to the forum-selection clause in this case, however, an analytical construct that focuses only on the causes of action

alleged and a hypothetical world where the agreement does not exist is inapt for several reasons.

[9] First, the contractual language at issue here uses the word "dispute"—defined as "[a] conflict or controversy, esp. one that has given rise to a particular lawsuit."[45] "Claim," on the other hand, means "the assertion of an existing right" or "[a] demand for money, property, or a legal remedy to which one asserts a right."[46] When a forum-selection clause encompasses all "disputes" "arising out of" the agreement, instead of "claims," its scope is necessarily broader than claims based solely on rights originating exclusively from the contract.[47]

45 *Dispute*, BLACK'S LAW DICTIONARY (10th ed. 2014).

46 *Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014).

47 *See Abbott Labs. v. Takeda Pharm. Co. Ltd.*, 476 F.3d 421, 424 (7th Cir. 2007) ("Abbott repeats its argument in different words when it says that since its suit is a tort suit—a suit for breach of a fiduciary duty to a partner in a joint venture—it arises out of Delaware tort law rather than out of the 1985 agreement. But the forum selection clause does not apply just to the litigation of *claims* that arise out of, concern, etc., the contract; it applies to the litigation of *disputes* that arise out of, concern, etc., the contract."); *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 922 F.Supp. 1334, 1378 (N.D. Iowa 1996) ("Terra's assertion of tort claims would not necessarily evade a forum selection clause even if that clause, by its terms, applied only to contract causes of action, [but] the fact that the clause applies to 'any disputes' [ ] plainly expands the scope of the clause to include the tort claims at issue here.").

***440 [10]** Second, the analysis the court of appeals applied encourages "artful pleading." A plaintiff could characterize its claim as a statutory or common-law tort claim to evade the agreed-upon forum despite essential allegations that are "inextricably enmeshed" or "factually intertwined" with the underlying contract.[48] In such cases, the forum-selection clause should be denied force only "if the facts alleged in support of the claim stand alone, are completely independent of the contract, and the claim could be maintained without reference to the contract."[49] "We cannot accept the invitation to reward attempts to evade enforcement of forum selection agreements through artful pleading of tort claims in the context of a contract dispute."[50]

48 *See AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 194-95 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (involving an arbitration provision extending to "[a]ny claim or controversy arising out of or relating to" a purchase agreement).

49 *Id.* at 195.

50 *Lambert v. Kysar*, 983 F.2d 1110, 1121 (1st Cir. 1993) (punctuation removed).

[11] With this legal framework in mind, we turn to the factual allegations supporting the Shareholders' complaints to determine whether (1) the existence or terms of the 2010 Amended Shareholders Agreement are operative facts in the dispute and (2) "but for" that agreement the shareholders would not be aggrieved. Engaging in a common-sense examination of the substance of the claims made and the terms of the forum-selection clause,[51] we conclude the claims fall within the clause's scope. Reviewing the allegations in the live pleadings, the dispute substantively concerns (1) the elimination of preemptive rights and designated shareholder statuses, (2) the dilution of equity, (3) various misrepresentation or omissions of required disclosures, and (4) actions taken without notice as required by the shareholders agreement.[52]

51 *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 884 (Tex. 2010) (orig. proceeding); *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677 (Tex. 2009) (orig. proceeding).

52 Sheldon and Konya complain of adverse actions the venture-capital defendants effected "without prior notice to other shareholders," including the conversion of preferred stock to common stock, the implementation of a reverse stock split, and the amendment of the shareholders agreement. The obligations to provide notice to other shareholders are found in various provisions of the shareholder agreements. For example, those with preemptive rights—like Sheldon before the 2010 amendments altered his rights under the 2008 shareholders agreement—are entitled to notice of any sale or

> offering of new securities. Additionally, any party to the shareholders agreement that did not consent to an amendment of agreement is entitled to "prompt notice" of the amendment.

In examining these disputes, a but-for relationship between the disputes and the shareholders agreement is evident. First, the 2008 shareholders agreement granted Sheldon preemptive rights and designated Sheldon as a "Significant Shareholder" and both Sheldon and Konya as "Key Shareholders"; the 2010 Amended Shareholders Agreement eliminated those rights and designations; but for these agreements, no dispute about the loss of preemptive rights and designations would exist. Second, uncontroverted evidence reveals that IDEV could not have obtained essential financing without amending the shareholders agreement in 2010; without amending the shareholders agreement in 2010, dilution of equity would not have occurred as alleged; thus, the dispute over diluted equity would not exist but for the 2010 amendment. Third, the petition explicitly states that the IDEV parties "failed to disclose material ***441** facts to Sheldon related to the 2010 [Amended] Shareholder[s] Agreement"; since the facts allegedly withheld were related to the 2010 amendment, no dispute would exist but for the agreement.

Additionally, we note that many of the statutory and common-law tort claims involve the same operative facts that would be implicated in a parallel breach-of-contract claim, had one been pursued. The shareholders agreement was designed to (1) protect the signatories from dilution, (2) grant them preemptive rights and shareholder-status designations, and (3) provide information rights and notice requirements. A contract claim or defense implicating these issues would involve the same operative facts as statutory and common-law tort claims addressing the same matters. Sheldon acknowledges this fact, stating "Sheldon chose, as was his right, not to seek a contractual remedy for violation of the preemptive right and of anti-dilution provisions of the shareholder agreements." Although Sheldon has that right, he cannot "evade enforcement of forum selection agreements through artful pleading of tort claims in the context of a contract dispute." [53]

53 *Lambert*, 983 F.2d at 1121 (punctuation removed).

Sheldon and Konya's petition reveals the central role the shareholders agreement plays in their claims. Notably, the factual allegations giving rise to the noncontractual claims are integral to the dispute's resolution. [54] Even though shareholders and corporations can have relationships without an agreement like the one at issue here, we cannot ignore the reality that an agreement, in fact, governs their relationship and Sheldon's and Konya's alleged grievances emanate from the existence and operation of that agreement. So, while shareholders might be able to assert tortious-interference, breach-of-fiduciary-duty, and other noncontractual claims even without a shareholders agreement, [55] the allegations in this case invoke the 2010 Amended Shareholders Agreement as an integral part of Sheldon's and Konya's claimed injuries. The claims asserted ultimately, and actually, depend on the existence of the 2010 Amended Shareholders Agreement, resolution of the case involves the validity of that agreement, and the operative facts implicate the IDEV parties' authority to act pursuant to that agreement.

54 *See Abbey v. Skokos*, 303 Fed.Appx. 911, 913 (2d Cir. 2008) (noting that "dispute[s] aris[e]" under a partnership agreement when the agreement is "integrally related" to the action and when the purchasing or sale of securities at issue in the common-law fraud, securities fraud, and negligent misrepresentation action is "accomplished through the partnership agreement").

55 *See* 477 S.W.3d at 418, 420 n.11 (observing that, even if there had been no shareholders agreement, the Shareholders would still be able to assert all their claims and a relationship would still exist between the parties because "[n]one of the parties to the shareholders agreement were obligated to enter into it by applicable corporate law").

For these reasons, we hold the dispute at issue arises out of the 2010 Amended Shareholders Agreement and therefore falls within the scope of the Delaware forum-selection clause. Our holding today is consistent with our precedent requiring that we focus on the substance of the claims, not the labels, and avoid "slavish adherence to a contract/tort distinction." [56] "To hold to the contrary would allow a litigant to avoid a forum-selection clause ***442** with 'artful pleading.' " [57]

56 *In re Int'l Profit Assocs.*, 274 S.W.3d at 677 (quoting *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 444 (5th Cir. 2008)).

57 *Id.* (quoting *Ginter*, 536 F.3d at 444).

We depart this issue with one final note concerning the but-for test and Sheldon and Konya's argument that when a claim

arises out of "general obligations imposed by law," it cannot arise out of the contract.[58] This may or may not be true for a forum-selection clause that covers "any *claim* arising from the Agreement," which we need not decide, but it is assuredly not true for a clause that applies to "any *dispute* arising from the Agreement." We recognize that language in *Lisa Laser* suggests the but-for test was satisfied there because the obligations arose out of the agreement, rather than general obligations imposed by law.[59] But while the fact that the obligations arose directly out of the agreement was sufficient to establish a but-for relationship between the "dispute" and the agreement in that case, we did not conclude it was necessary.

58 The court of appeals took a similar position: "A common-sense examination of the substance of the Shareholders' claims shows that general legal obligations, rather than any of the shareholders agreements, establish the alleged duties that the IDev Parties purportedly breach.... Thus, the agreements with a Delaware forum-selection clause and the plaintiffs' claims lack the 'but for' relationship upon which the Supreme Court of Texas relied in *Lisa Laser*." 477 S.W.3d at 418.

59 *See, e.g.*, *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 884-86 (2010) (orig. proceeding) ("HealthTronics alleges that Lisa Laser failed to inform it of new products and failed to offer it a right of first refusal to distribute new products in the United States. Lisa Laser's *obligation, if any, to do so only arises from the Distribution Agreement* ... HealthTronics's claims *arise out of the Agreement rather than other general obligations imposed by law.* That is, *but for the Agreement*, HealthTronics would have no basis to complain...." (emphases added)).

C. Konya is Bound by the Delaware Forum-Selection Clause

[12] Even if the shareholders' statutory and common-law tort claims fall within the scope of the forum-selection clause, Konya asserts he is not required to litigate in Delaware because he signed only the 2004 Amended Shareholders Agreement, which designated a Texas forum, and thus never assented to a Delaware forum. We disagree.

Although Konya did not sign a shareholders agreement designating a Delaware forum, he agreed that the 2004 Amended Shareholders Agreement could be amended by "a written instrument signed by the Corporation and the holders of at least a majority of the then outstanding shares of voting stock of the Corporation that are subject to [the shareholders] Agreement," with certain limitations not alleged to be applicable here (Majority Amendment Provision). Konya does not dispute that this protocol was followed when the forum-selection clause was amended in 2006 to vest exclusive jurisdiction in Delaware.[60] Instead, Konya argues that a provision included in the 2004, 2006, 2008, and 2010 shareholder agreements made all amendments effective only "at such time [the amended shareholders agreement] is executed by the corporation and, with respect to a Shareholder, by such Shareholder" (Effectiveness Provision). Because he never signed the 2006 agreement, he argues amendment of the forum-selection clause is ineffective as to him.

60 Nor does Konya dispute that the amendments to the 2008 and 2010 shareholder agreements complied with the nonunanimous amendment provisions in those agreements.

[13] The Effectiveness Provision states: "This Agreement shall become effective at such time it is executed by the Corporation and, with respect to a Shareholder, ***443** by such Shareholder." We interpret contracts to "harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless."[61] Konya signed the 2004 agreement, thereby consenting to non-unanimous amendment of the agreement. To interpret the Effectiveness Provision as requiring Konya's signature to bind him to the amended agreement would render the Majority Amendment Provision meaningless. The only reasonable interpretation of the Effectiveness Provision is that it applies to shareholders who had not already consented to the Majority Amendment Provision in the 2004 agreement and provides the method by which new shareholders become parties to the shareholders agreement. Shareholders who consented to the Majority Amendment Provision in the 2004 agreement would already be bound by amendments made in accordance with their assent to the amendment provision.

61 *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

Thus, when Konya signed the 2004 agreement and consented to the Majority Amendment Provision, Konya bound himself to any properly amended forum-selection clause. [62] Further, in his petition, Konya alleges "Konya was identified in the Shareholder Agreement as a 'Key Shareholder,' " indicating he will rely on this status designation in his suit. But Konya was not identified as a "Key Shareholder" until the 2006 agreement. Konya cannot rely on an agreement for a status designation and at the same time argue the agreement's provisions are not effective as to him.

62 *See Fort Transfer Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, No. 05-1236, 2006 WL 1582451, at *3 (C.D. Ill. June 6, 2006) (holding party who signed an agreement with a provision providing another party with authority to unilaterally amend the agreement is bound to a unilaterally amended forum-selection clause).

Accordingly, we hold Konya bound himself to the Delaware forum-selection clause by signing the 2004 agreement and consenting to nonunanimous amendment of that agreement.

D. Owens and Burke Cannot Enforce the Forum-Selection Clause

[14] Owens signed the 2010 Amended Shareholders Agreement as IDEV's CEO, but not in his individual capacity. Burke, IDEV's CFO, did not sign the agreement in any capacity. As a general proposition, a forum-selection clause may be enforced only by and against a party to the agreement containing the clause. [63] Because forum-selection clauses are creatures of contract, the circumstances in which nonsignatories can be bound to a forum-selection clause are rare. [64] The question here is whether Owens and Burke as nonsignatories can invoke the forum-selection clause against Sheldon and Konya as signatories to the agreement.

63 *Cf. In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011) (orig. proceeding) (discussing arbitration agreements).

64 *Id.*; *cf. G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 524 (Tex. 2015) ("We have recognized, however, that in some circumstances a non-signatory can be bound to, or permitted to enforce, an arbitration agreement."); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (orig. proceeding) (identifying theories arising out of common principles of contract and agency law that may bind nonsignatories to an arbitration agreement).

Owens and Burke contend enforcement is permitted under the following theories: (1) the transaction-participant theory; (2) the substantially interdependent and concerted misconduct doctrine; and (3) the ***444** mandatory-venue provisions in sections 15.004 and 15.020 of the Texas Civil Practice and Remedies Code. We conclude, however, that none of these theories supports enforcement of the forum-selection clause as to the claims against Owens and Burke and, as a result, the trial court erred in granting their motion to dismiss.

1. Transaction Participants

[15] Although this Court has not previously addressed the matter, other courts have held that "transaction participants" may enforce a valid forum-selection clause even if they are not actual signatories to the contract. [65] A "transaction participant" includes "an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause." [66] Courts recognizing the validity of this enforcement theory have done so "solely in the context of a nonsignatory defendant attempting to enforce a forum-selection clause against a signatory plaintiff, who did not want the clause enforced," and not the converse. [67]

65 *See Carlile Bancshares, Inc. v. Armstrong*, Nos. 02-14-00014-CV, 02-14-00018-CV, 2014 WL 3891658, at *10 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.) ("Nonsignatories may be subject to forum-selection clauses if they were transaction participants." (citing *Brock v. Entre Comput. Ctrs., Inc.*, 740 F.Supp. 428, 430-31 (E.D. Tex. 1990))); *see also Dunlap Enters. v. Roly Poly Franchise Sys., L.L.C.*, No. 05-08-01556-CV, 2010 WL 2880179, at *3 (Tex. App.—Dallas July 23, 2010, no pet.) (finding no abuse of discretion in trial court's finding that nonparties were subject to forum-selection clause as "transactional participants" in those agreements); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 75 (Tex. App.—Dallas 1996, no pet.) (observing that "a valid forum selection clause governs all transaction

participants, regardless of whether the participants were actual signatories to the contract"), *overruled in part on other grounds by In re Tyco Elecs. Power Sys., Inc.*, No. 05-04-01808, 2005 WL 237232, at *4 & n.1 (Tex. App.—Dallas Feb. 2, 2005, orig. proceeding) (mem. op.).

66 *Accelerated Christian*, 925 S.W.2d at 75.

67 *Carlile Bancshares*, 2014 WL 3891658, at *10.

As articulated by our intermediate appellate courts, the transaction-participant theory is similar to the doctrine federal courts employ to bind nonsignatories to forum-selection clauses when they are "closely related to the contractual relationship."[68] In such circumstances, enforcement is permitted if the relationship between a nonsignatory and a signatory to the contract is close enough that the nonsignatory's enforcement of the forum-selection clause would be "foreseeable" to the opposing party.[69] The rationale supporting enforcement in such circumstances is that signatories have already "assented ***445** to a forum selection clause and thus have agreed to litigate disputes relating to the contract in the chosen forum" such that enforcing the provision "comports with the 'legitimate expectations of the parties, [as] manifested in their freely negotiated agreement.' "[70]

68 *See, e.g., Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 723 (2d Cir. 2013) ("We hold that a non-signatory to a contract containing a forum selection clause may enforce the forum selection clause against a signatory when the non-signatory is 'closely related' to another signatory." (punctuation removed)); *Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 456 (9th Cir. 2007) ("[W]here the alleged conduct of the nonparties is closely related to the contractual relationship, a range of transaction participants, parties and nonparties, should benefit from and be subject to forum selection clauses."); *Marano Enters. of Kan. v. Z–Teca Rests., L.P.*, 254 F.3d 753, 757-58 (8th Cir. 2001); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 (11th Cir. 1998); *Baker v. LeBoeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1105-06 (6th Cir. 1997); *Manetti–Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988).

69 *Magi XXI*, 714 F.3d at 723; *see also Lipcon*, 148 F.3d at 1299 ("In order to bind a non-party to a forum selection clause, the party must be 'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound." (quoting *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993))).

70 *Magi XXI*, 714 F.3d at 723.

[16] **[17]** We need not decide whether a transaction participant could enforce a forum-selection clause, or under what circumstances, because we conclude the 2010 Amended Shareholders Agreement's express terms preclude its application in this case. As we have said in an analogous context, the question of who is actually bound to dispute resolution in the contractually specified forum " 'is [ultimately] a function of the intent of the parties as expressed in the terms of the agreement.' "[71]

71 *Cf. In re Rubiola*, 334 S.W.3d 220, 224-25 (Tex. 2011) (orig. proceeding) (holding "parties to an arbitration agreement may grant nonsignatories the right to compel arbitration" and quoting *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 355, 358 (5th Cir. 2003), with regard to nonsignatory enforcement of an arbitration agreement).

Section 25 of the 2010 Amended Shareholders Agreement sets out the forum-selection clause and, at the same time, limits the rights and remedies of nonparties to the agreement as follows:

> This Agreement ... shall inure to the benefit of and be binding upon, the successors, permitted assigns, legatees, distributees, legal representatives and heirs of each party and *is not intended to confer upon any person, other than the parties and their permitted successors and assigns, any rights or remedies hereunder.*[72]

The contract's plain language thus disclaims any intent to extend the contract's benefits to nonparties. Allowing

Owens and Burke to enforce the forum-selection clause as "transaction participants" would contravene the parties' expressed intent and is, thus, impermissible. [73] Moreover, in light of the contract's language, enforcement of the forum-selection clause by Owens and Burke against Sheldon and Konya would not have been reasonably foreseeable, as the transaction-participant enforcement theory contemplates.

72 Emphasis added.

73 *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 22 (Tex. 2014) ("A written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the limitations of the parol-evidence rule.").

[18] We acknowledge, however, that contract language can extend enforcement rights to nonsignatories, as we held in *In re Rubiola*, an arbitration case in which we concluded that nonsignatories to an arbitration agreement could compel arbitration of claims brought by contract signatories when "the arbitration agreement expressly provides that certain non-signatories are considered parties" to the agreement. [74] The *Rubiola* agreement defined the contract parties to include "Rubiola Mortgage Company, and each and all persons and entities signing this agreement or any other agreement between or among any of the parties as part of this transaction" as well as "individual partners, affiliates, officers, directors, employees, agents, and/or representatives of any party to such documents." [75] Accordingly, Rubiola Mortgage Company's President and Vice President were, by express agreement, parties to the contract.

74 334 S.W.3d at 225.

75 *Id.* at 222-23.

***446** Here, the parties were neither silent on the matter nor as inclusive as *Rubiola* with respect to their intent. To the contrary, the 2010 Amended Shareholders Agreement extends to a more narrow group of nonparties, speaks directly to the matter at hand, and disavows any intent to extend contractual rights and remedies to anyone other than the parties and their permitted successors and assignees.

We therefore hold that Owens and Burke cannot rely on the transaction-participant doctrine to enforce the forum-selection clause against Sheldon and Konya.

2. The Concerted Misconduct Doctrine

[19] Owens and Burke also seek the benefits of the contractual forum-selection clause based on the "substantially interdependent and concerted misconduct" doctrine. Under this equitable-estoppel doctrine, nonsignatories may enforce a forum-selection clause "when a signatory to the contract containing the forum selection clause raises allegations of substantially interdependent and concerted misconduct by both non-signatories and one or more signatories to the contract." [76]

76 *CKH Family Ltd. P'ship v. MGD/CCP Acquisition, LLC*, No. 05-12-00573-CV, 2013 WL 5614304, at *4 (Tex. App.—Dallas Oct. 14, 2013, no pet.); *see also Deep Water Slender Wells, Ltd. v. Shell Int'l Expl. & Prod., Inc.*, 234 S.W.3d 679, 694 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Phx. Network Techs. (Eur.)Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 622-24 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *accord CNOOC Se. Asia Ltd. v. Paladin Res. (SUNDA) Ltd.*, 222 S.W.3d 889, 894 (Tex. App.—Dallas 2007, pet. denied).

In *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, [77] we observed that we had previously declined to adopt the concerted-misconduct doctrine in an arbitration case, *In re Merrill Lynch Trust Co. FSB*, [78] and would not reconsider the matter because the parties neither addressed nor distinguished *Merrill Lynch*. [79] We do the same in this case for the same reason. [80]

77 458 S.W.3d 502 (Tex. 2015).

78 235 S.W.3d 185, 191-92 (Tex. 2007) (orig. proceeding) (stating "we have never compelled arbitration based solely on substantially interdependent and concerted misconduct, and for several reasons we decline to do so here").

79 *G.T. Leach Builders*, 458 S.W.3d at 529 n.23.

80 *Cf. In re Golden Peanut Co.*, 298 S.W.3d 629, 631 (Tex. 2009) (orig. proceeding) ("[A]rbitration clauses are, 'in effect, a specialized kind of forum-selection clause.' " (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41

> L.Ed.2d 270 (1974))); *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677 (Tex. 2009) (orig. proceeding) ("[W]e have drawn analogies between forum-selection clauses and arbitration clauses.").

3. The Major-Transaction Mandatory-Venue Provision

Section 15.020(c) of the Texas Civil Practice and Remedies Code provides:

> [A]n action arising from a major transaction may not be brought in a county if:
>
> ....
>
> (2) the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction, and the action may be brought in that other county, under this section or otherwise, or in that other jurisdiction. [81]

The term "major transaction" is defined as "a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate ***447** stated value equal to or greater than $1 million." [82]

81 TEX. CIV. PRAC. & REM. CODE § 15.020(c).

82 *Id.* § 15.020(a).

Section 15.020 is a mandatory-venue provision, and when it is implicated, the tag-along venue provision in section 15.004 also applies. That provision states:

> In a suit in which a plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by the mandatory venue provisions of Subchapter B [including section 15.020], the suit shall be brought in the county required by the mandatory venue provision. [83]

83 *Id.* § 15.004.

[20] Owens and Burke assert that, pursuant to section 15.004, the plaintiffs' claims against the nonsignatory defendants must be piggybacked onto claims that are subject to mandatory venue in Delaware because (1) the allegations in this case involve a major transaction within the meaning of section 15.020 and (2) the forum-selection clause in the 2010 Amended Shareholders Agreement provides for mandatory venue in Delaware as to the claims against the signatory defendants (the venture-capital shareholders and directors). The major transaction Owens and Burke cite is the 2010 Series B-1 Financing that precipitated the 2010 amendments to the shareholders agreement. That financing arrangement, they say, qualifies as a "major transaction" under section 15.020 because it involved "greater than $1 million" in consideration.

We do not agree that section 15.004 compels dismissal of the claims against Owens and Burke. First, section 15.020 requires the transaction to be "evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million." [84] Although the written financing agreement was not included in the record, there does not appear to be any dispute that it does involve consideration above section 15.020's monetary threshold. But even if that circumstance is evident, or conceded, section 15.020(c)(2) applies only when "the party bringing the action has agreed in writing that an action *arising from the transaction* must be brought ... in another jurisdiction." [85] Here, the parties only agreed in writing that "any dispute arising out of" the *2010 Amended Shareholders Agreement* must be brought in Delaware. Importantly, the shareholders agreement is separate and distinct from the financing agreement. And even though disputes arising out of the shareholders agreement may concern other events connected with the transaction, the record bears no evidence that the parties ever agreed in writing on a particular forum for "an action arising from" the financing transaction. Accordingly, this argument fails.

84 *Id.* § 15.020(a).

85 *Id.* § 15.020(c) (emphasis added).

Because Owens and Burke could not enforce the forum-selection clause against Sheldon and Konya under the legal

theories presented, the trial court erred in granting their motion to dismiss.

III. Conclusion

For the reasons stated, we therefore reverse the court of appeals' judgment, render judgment dismissing Sheldon's and Konya's claims in part, and remand the ***448** case to the trial court for further proceedings in part.

All Citations

526 S.W.3d 428, 60 Tex. Sup. Ct. J. 1015

Appendix F

In re Killick Aerospace Ltd., No. 02-20-00280-CV, 2020 WL 7639575 (Tex. App.—Ft. Worth Dec. 23, 2020, orig. proceeding)

2020 WL 7639575
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Fort Worth.

IN RE KILLICK AEROSPACE
LIMITED and Killick Aerospace, LLC

No. 02-20-00280-CV
|
Delivered: December 23, 2020

On Appeal from the 236th District Court, Tarrant County, Texas, Trial Court No. 236-315925-20, HON. THOMAS WILSON LOWE, III, Judge

Attorneys and Law Firms

ATTORNEY FOR RELATOR: DAVID JOHNSON, WINSTEAD PC, FORT WORTH, TX.

ATTORNEY FOR RPI: NEIL BURGER, MONICA LATIN, CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, LLP, DALLAS, TX.

Before Sudderth, C.J.; Kerr and Womack, JJ.

MEMORANDUM OPINION

Memorandum Opinion by Chief Justice Sudderth

***1** In this mandamus proceeding, relators Killick Aerospace Limited and Killick Aerospace, LLC (collectively, the Killick Parties) ask us to direct the trial court to vacate its order denying their motion to dismiss the claims brought against them by real parties in interest Bombardier Inc. and Learjet, Inc. Because the trial court clearly abused its discretion and because the Killick Parties lack an adequate remedy by appeal, we conditionally grant mandamus relief and order the trial court to vacate its order denying the Killick Parties' motion to dismiss, and we direct the trial court to enter an order dismissing Bombardier and Learjet's claims against the Killick Parties.

Background

This case involves employees leaving their employer for a competitor and allegedly taking confidential information and trade secrets with them. As alleged, William Molloy, Stefan O'Hare, Kiril Jakimovski, and Jason Lehew (collectively, the Individual Defendants) were employed by Bombardier and were instrumental in developing Bombardier's business-aircraft-teardown division. Around March 2019, the Individual Defendants developed a business plan that contemplated leaving Bombardier to conduct a business-aircraft-teardown division for a competitor. As alleged, the Individual Defendants later began contacting Bombardier's competitors, including the Killick Parties, regarding their business plan.

Around this time, Killick Limited entered into two distribution agreements with Learjet, a company owned and controlled by Bombardier. Those distribution agreements called for Killick Limited to be the exclusive distributor of certain Learjet/Bombardier aircraft parts. Through those distribution agreements, Killick Limited was granted the right to possess and use certain of Bombardier's confidential information and trade secrets, although Killick Limited's use of Bombardier's confidential information and trade secrets was limited "solely" for the purposes of performing Killick Limited's contractual obligations.

Toward the end of 2019 and the beginning of 2020, the Individual Defendants left their employment at Bombardier and began working for the Killick Parties. As alleged, the Individual Defendants took Bombardier's confidential information and trade secrets with them when they left their employment with Bombardier.

Bombardier and Learjet later filed a lawsuit against the Killick Parties and the Individual Defendants. In the original petition, Bombardier [1] brought claims against the Killick Parties for: (1) misappropriation of its confidential and proprietary information; (2) violation of the Texas Uniform Trade Secrets Act; and (3) breach of the distribution agreements. [2] Bombardier also sought injunctive relief to prohibit the Killick Parties "from any use of Bombardier's trade secrets and confidential and proprietary information and know-how" and sought the return of "all of Bombardier's tangible trade secrets and confidential and proprietary information in [the Killick Parties'] possession, custody, or control."

1 Although the original petition was filed by both Bombardier and Learjet, all the claims in the lawsuit appear to be brought on behalf of Bombardier (i.e., Bombardier, not Learjet, is mentioned as the party who was damaged for each of the claims, and Bombardier, not Learjet, is the party praying for relief).

2 Bombardier alleged the following claims against the Individual Defendants: (1) misappropriation of its confidential and proprietary information; (2) violation of the Texas Uniform Trade Secrets Act; (3) breach of the duty of loyalty; (4) conversion; and (5) theft.

***2** The Killick Parties filed a motion to dismiss the claims brought against them based on a forum-selection clause contained in the distribution agreements entered between Killick Limited and Learjet. That forum-selection clause—which is identical for each of the two distribution agreements—provides:

> [Killick Limited] and Learjet each irrevocably agree to submit any action, suit or proceeding arising out of, or connected with, this Agreement to the courts of the State of Kansas, which shall have exclusive jurisdiction to adjudicate any such action, suit or proceeding.

Bombardier and Learjet then amended their petition. In the amended petition, they removed Bombardier's breach of contract claim relating to the distribution agreements and deleted certain paragraphs and references to the breaches of the distribution agreements. In the amended petition, Bombardier still brought claims against the Killick Parties for misappropriation of its confidential and proprietary information and for violation of the Texas Uniform Trade Secrets Act, and it still sought injunctive relief relating to the Killick Parties' possession and use of its trade secrets and confidential and proprietary information. [3]

3 As with the original petition, the amended petition was filed by both Bombardier and Learjet, but all the claims in the amended petition appear to be brought on behalf of Bombardier (i.e., Bombardier, not Learjet, is mentioned as the party who was damaged for each of the claims, and Bombardier, not Learjet, is the party praying for relief).

An affidavit made by Bombardier's vice president was attached to the amended petition. That affidavit referenced the distribution agreements and mentioned that the distribution agreements "would necessarily expose [the Killick Parties] to certain Bombardier business aircraft trade secrets, confidential and proprietary information, and know how." Excerpts of the distribution agreements were attached to the affidavit. Those excerpts included a provision defining "confidential information" as "information of whatever kind ... which is disclosed by a representative of one Party ... to a representative of the other Party ... in connection with this Agreement which, at the time of disclosure ... would be understood by the Parties, exercising reasonable business judgment, to be confidential." That provision further stated that "models, prototypes, designs, drawings, materials, samples, coupons, tools, software and equipment supplied by Learjet to [Killick Limited] shall constitute Confidential Information of Learjet and/or Bombardier." Other provisions provided that confidential information "shall be used solely for performance of [the distribution agreements]" and "shall be retained in confidence" by the party receiving the confidential information.

In response to the amended petition, the Killick Parties filed a supplement to their motion to dismiss, arguing that their motion to dismiss should still be granted despite the changes to the original petition. The Killick Parties maintained that in order to adjudicate Bombardier's claims, the trial court would have to determine the Killick Parties' rights to possess and use Bombardier's trade secrets and confidential and proprietary information under the distribution agreements, as well as whether Bombardier had consented to such possession and use. Because the trial court would have to look at the distribution agreements to make those determinations, the Killick Parties argued that the claims against them were factually intertwined with the distribution agreements. But the trial court disagreed and denied the Killick Parties' motion to dismiss. This mandamus proceeding followed.

Discussion

A. Mandamus Standard

***3** We grant the extraordinary relief of mandamus only when the trial court has clearly abused its discretion and the relator lacks an adequate appellate remedy. *In re Team Rocket, L.P.*,

256 S.W.3d 257, 259 (Tex. 2008) (orig. proceeding); *see In re State*, 355 S.W.3d 611, 613 (Tex. 2011) (orig. proceeding).

A trial court abuses its discretion if it fails to correctly analyze or apply the law to the facts. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302–03 (Tex. 2016) (per curiam) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding); *see also State v. Naylor*, 466 S.W.3d 783, 793 (Tex. 2015) (orig. proceeding) ("A writ of mandamus is an extraordinary remedy available 'to correct an action of a trial judge who ... [violates] a clear duty under the law.' " (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding))). We defer to a trial court's factual determinations that have evidentiary support, but we review the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding).

The adequacy of an appellate remedy "has no comprehensive definition," but determining whether a remedy is adequate usually requires a "careful balance of jurisprudential considerations" that "implicate both public and private interests." *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (per curiam) (orig. proceeding) (quoting *In re Prudential Ins. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)); *see also In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding) ("Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review."). With regard to a trial court's refusal to enforce a forum-selection clause, the Texas Supreme Court has already conducted the balancing test, holding that the failure to enforce a valid forum-selection clause leaves a litigant without an adequate remedy on appeal. *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009) (per curiam) (orig. proceeding). Therefore, we need only determine whether the forum-selection clause here applies to Bombardier's claims.

B. The Law Regarding Forum-Selection Clauses

Under Texas law, forum-selection clauses "are generally enforceable and should be given full effect." *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 436 (Tex. 2017). A trial court abuses its discretion if it refuses to enforce a forum-selection clause unless the party opposing enforcement clearly shows that (1) the clause is invalid for reasons of fraud or overreaching, (2) enforcement would be unreasonable or unjust, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. *Int'l Profit Assocs.*, 274 S.W.3d at 675. "[A] party attempting to show that such a clause should not be enforced bears a heavy burden." *Id.*

Whether a claim falls within a forum-selection clause depends on the parties' intent as expressed in their agreement and a "common-sense examination" of the substantive factual allegations. *Sheldon*, 526 S.W.3d at 437. Legal theories and causes of action are not controlling, and we should avoid slavish adherence to a contract–tort distinction because doing otherwise would allow a litigant to avoid a forum-selection clause with artful pleading. *Id.* The starting point of our inquiry into whether a claim falls within a forum-selection clause is the language of the clause itself. *Id.* Forum-selection clauses, like the one at issue here, that cover claims "arising out of" or "connected with" a contract are especially broad and capable of expansive reach. *See id.* at 437, 439.

***4** Courts should be mindful that a plaintiff could characterize its claim as a tort claim to evade the agreed-upon forum despite essential allegations that are "inextricably enmeshed" or "factually intertwined" with the underlying contract. *Id.* at 440. In such cases, the forum-selection clause should be denied force only if the facts alleged in support of the claim can stand alone, the alleged facts are completely independent of the contract, and the claim could be maintained without reference to the contract. *Id.*

C. Application of the Law to the Facts

While Bombardier and Learjet's original petition included a claim against the Killick Parties for breach of the distribution agreements, that claim, along with certain references to the distribution agreements, was removed in the amended petition. In the amended petition, Bombardier limited its claims against the Killick Parties to misappropriating its confidential and proprietary information, to violating the Texas Uniform Trade Secrets Act, and to a request for injunctive relief relating to the Killick Parties' possession and use of its trade secrets and confidential and proprietary information. In their response to the Killick Parties' petition for writ of mandamus, Bombardier and Learjet argue that because Bombardier's claims against the Killick Parties do not rely upon or relate to the distribution agreements, the trial court did not abuse its discretion by denying the Killick Parties' motion to dismiss. We disagree.

To prove the claims asserted against the Killick Parties in the amended petition, Bombardier must establish that

the Killick Parties possessed or used its trade secrets or confidential and proprietary information without its express or implied consent. *See* Tex. Civ. Prac. & Rem. Code Ann. § 134A.002(3)(B) ("misappropriation" means "disclosure or use of a trade secret of another without express or implied consent"); *Mesquite Servs., LLC v. Standard E&S, LLC*, No. 07-19-00440-CV, 2020 WL 5540189, at *8 (Tex. App.—Amarillo, Sept. 15, 2020, pet. filed) (listing as a required element of a misappropriation-of-trade-secrets claim that "the [trade] secret [be] utilized by the defendant without the plaintiff's authorization"). Because the distribution agreements expressly granted Killick Limited the right to possess and use certain of Bombardier's trade secrets and confidential and proprietary information—a fact acknowledged in the affidavit of Bombardier's vice president that was attached to its amended pleading—the trier of fact would necessarily have to look at the distribution agreements to determine whether Bombardier had consented to the possession and use of the allegedly misappropriated trade secrets and confidential and proprietary information. Because the trier of fact would have to look at the distribution agreements to make that determination, the claims against the Killick Parties in this lawsuit are connected with and factually intertwined with the distribution agreements and thus cannot stand on their own. *See Sheldon*, 526 S.W.3d at 440.

D. Who may enforce the forum-selection clause and who may it be enforced against?

Here, because the distribution agreements were signed by Killick Limited and Learjet, certainly Killick Limited may enforce the forum-selection clause against Learjet. *See In re Laibe Corp.*, 307 S.W.3d 314, 317 (Tex. 2010) (orig. proceeding). But a question remains as to whether Killick Limited may enforce the forum-selection clause against Bombardier, a nonsignatory, and whether Killick LLC, a nonsignatory, may enforce the forum-selection clause against Bombardier and Learjet.

***5** The Killick Parties argue that the forum-selection clause is enforceable against Bombardier and enforceable by Killick LLC because they are transaction participants to the distribution agreements. In their response, Bombardier and Learjet do not suggest that the transaction-participant theory does not apply to Killick LLC or Bombardier, nor do they suggest that the forum-selection clause should not be enforced against Bombardier or by Killick LLC because they are nonsignatories to the distribution agreements. Nevertheless, because we think that discussion of the transaction-participant theory and its relation to the parties in this proceeding is necessary to our analysis, we will address it.

While the Texas Supreme Court has discussed the transaction-participant theory of enforcement in recent cases, it has not yet either endorsed or rejected the theory. *See Rieder v. Woods*, 603 S.W.3d 86, 99–101 (Tex. 2020); *Sheldon*, 526 S.W.3d at 444–45. In *Sheldon*, the court noted that many other courts, including our own, have held that "transaction participants" may enforce a valid forum-selection clause even if they did not sign the contract containing the forum-selection clause. [4] *Sheldon*, 526 S.W.3d at 444 (discussing theory and collecting cases). The court also observed that "[c]ourts recognizing the validity of this enforcement theory have done so 'solely in the context of a nonsignatory defendant attempting to enforce a forum-selection clause against a signatory plaintiff, who did not want the clause enforced.' " *Id.* (quoting *Carlile Bancshares, Inc. v. Armstrong*, No. 02-14-00014-CV, 2014 WL 3891658, at *10 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.)).

4 Without embracing the theory, the court nevertheless explained the rationale behind it, i.e., that the transaction-participant theory is rooted in foreseeability. *Sheldon*, 526 S.W.3d at 444–45

In *Rieder v. Meeker*, we noted that "although Texas courts have not explicitly expanded the transaction-participant analysis beyond the context of a nonsignatory defendant attempting to enforce a forum-selection clause against a signatory plaintiff, federal courts and other states have not so limited the doctrine." 587 S.W.3d 32, 54 (Tex. App.—Fort Worth 2018), *rev'd on other grounds*, 603 S.W.3d at 89, 100–02; *see, e.g., SSAB Ala., Inc. v. Kem-Bonds, Inc.*, CV 17-0175-WS-C, 2017 WL 6345809, at *3 n.3 (S.D. Ala. Dec. 12, 2017) (order) (explaining that when "the alleged conduct of the nonparties is closely related to the contractual relationship, a range of transaction participants, parties and nonparties, should benefit from and be subject to forum selection clauses"). In our opinion in *Rieder*, we went on to hold that a nonsignatory could enforce a forum-selection clause against another nonsignatory under the transaction-participant theory when such enforcement was foreseeable. [5] 587 S.W.3d at 55–56.

5 Our *Rieder* opinion was ultimately reversed by the Texas Supreme Court, which held that enforcement of the forum-selection clause on the nonsignatory

was not foreseeable given the facts of the case. 603 S.W.3d at 100–01.

Applying our own precedent, we must decide here whether it was foreseeable that the forum-selection clause could be enforced against Bombardier by Killick Limited and whether it was foreseeable that the forum-selection clause could be enforced by Killick LLC against Bombardier and Learjet. [6] As it relates to the enforcement against Bombardier by Killick Limited, the record reflects that Bombardier is Learjet's parent company. The record also contains a declaration from one of the Individual Defendants stating that Bombardier "led and controlled all of the negotiations of the [d]istribution [a]greements with Killick [Limited]," that Learjet signed the distribution agreements "only upon express approval from [Bombardier]," and that Bombardier insisted that the forum-selection clause be included in the distribution agreements. Moreover, Bombardier was referenced throughout the distribution agreements and was granted certain rights and benefits under the agreements. For example, Section 2.2 of one of the distribution agreements provided that Killick Limited could not sell certain defined parts without Bombardier's prior written consent, and Section 11.1 of that agreement required Killick Limited to maintain certain insurance "without prejudice to its liability to Bombardier." Both distribution agreements acknowledged Killick Limited's right to possess and use certain of Bombardier's trade secrets and confidential information and provided certain restrictions on the possession and use of those trade secrets and confidential information. Both agreements also prohibited Killick Limited from disparaging Bombardier's reputation, and both required Killick Limited to send notices under the agreements to Bombardier. According to the declaration of one of the Individual Defendants, Bombardier was the party that added the references to Bombardier contained in the distribution agreements. Based on the totality of that evidence, we hold that it was foreseeable that the forum-selection clause could be enforced by Killick Limited against Bombardier. [7] *See Sheldon*, 526 S.W.3d at 444–45.

6 In their petition, the Killick Parties also discuss the "closely related" theory, which they say is "similar and factually overlapping" to the transaction-participant theory. We will follow the Texas Supreme Court's lead and treat these two theories as one overlapping theory. *See Rieder*, 603 S.W.3d at 98 ("Because of the overlap and similarity between the two enforcement theories, we refer to them collectively as the 'transaction-participant theory.' ").

7 In their petition, the Killick Parties also contend that Killick Limited may enforce the forum-selection clause against Bombardier because Bombardier is a third-party beneficiary to the distribution agreements. Because we have determined that Killick Limited may enforce the forum-selection clause against Bombardier under the transaction-participant theory, we need not address this alternative enforcement theory. *See* Tex. R. App. P. 47.1.

***6** As it relates to the enforcement of the forum-selection clause by Killick LLC against Bombardier and Learjet, the record reflects that Killick LLC and Killick Limited are both subsidiaries of and controlled by a different Killick entity and that Killick LLC is an "affiliate" of Killick Limited as that term is defined in the distribution agreements. [8] The record further reflects that the distribution agreements require Killick Limited (an Irish entity) to maintain a place of business within the United States to enable it to perform the distribution agreements in the United States and that Killick LLC is the entity fulfilling that obligation. As stated in an affidavit by Killick LLC's president, Killick LLC "provides all logistics for performance of the [d]istribution [a]greements within the United States" and with respect to purchases made under the distribution agreements, Killick LLC places orders on behalf of Killick Limited with Bombardier, and the parts ordered are shipped to Killick LLC's warehouse. Additionally, one of the distribution agreements calls for notices under the agreement to be sent to both Killick Limited and Killick LLC. Finally, the record reflects that Bombardier and Learjet's pleadings offer little, if any, distinction between Killick Limited and Killick LLC: the amended petition collectively refers to both entities as "Killick" in the first paragraph of the petition, and the facts and claims mentioned in the petition do not distinguish between Killick Limited and Killick LLC but simply refer to "Killick." Based on the totality of that evidence, we hold that it was foreseeable that the forum-selection clause could be enforced by Killick LLC against Bombardier and Learjet. [9] *See Sheldon*, 526 S.W.3d at 444–45; *Rieder*, 587 S.W.3d at 54.

8 The distribution agreements define an "affiliate" as "with respect to any person or entity, any other person or entity directly or indirectly controlling, controlled by or under common control with such person or entity."

9 In their petition, the Killick Parties also briefly claim that the forum-selection clause may be enforced by Killick LLC against Bombardier and Learjet because of the "direct benefits estoppel" theory. Again, because we have determined that Killick LLC may enforce the forum-selection clause against Bombardier and Learjet under the transaction-participant theory, we need not address any alternative enforcement theory. *See* Tex. R. App. P. 47.1.

Conclusion

Having determined that the forum-selection clause is enforceable by both Killick Limited and Killick LLC against both Bombardier and Learjet and having determined that the claims asserted against the Killick Parties in this lawsuit are factually intertwined with the distribution agreements and cannot stand on their own, we hold that the trial court abused its discretion by denying the Killick Parties' motion to dismiss. And because the Texas Supreme Court has instructed us that "no adequate remedy by appeal [exists] when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute," *Int'l Profit Assocs.*, 274 S.W.3d at 675, we hold that the Killick Parties lack an adequate remedy by appeal. [10]

10 In their response, Bombardier and Learjet do not suggest that the Killick Parties have an adequate remedy by appeal.

Because the trial court clearly abused its discretion and because the Killick Parties have no adequate remedy by appeal, the Killick Parties are entitled to mandamus relief. Accordingly, we conditionally grant a writ of mandamus and direct the trial court to vacate its order denying the Killick Parties' motion to dismiss, and we direct the trial court to enter an order dismissing the claims brought against the Killick Parties. *See* Tex. R. App. P. 52.8(c). Our writ will issue only if the trial court fails to comply.

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